TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]24

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

NYE SCHNEIDER FOWLER CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED JANUARY 13, 1921.

(28,037)

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OCTOBER TERM, 1920.

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INDEX.

	Original.	Print.
Caption	a	1
Transcript of record from the district court of Dodge County	1	1
Petition	1	2
Answer	12	10
Reply	14	12
Journal entries	14	12
Instructions given	15	13
Instructions refused	27	23
Verdict	29	25
Judgment	29	25
Motion for new trial	30	25
Motion for taxation of attorney's fees	34	30
Objection to taxation	37	32
Judgment	39	33
Notice of appeal	40	34
Supersedeas bond	40	34
Proceedings on motion for new trial and taxation of fees	43	35

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	Original.	Print.
Testimony of W. G. Kellogg	48	39
E. J. Slater	50	40
W. J. Courtright	54	43
A. G. Leidlaw	57	43
Exhibit A—Extract from yard record book	59	45
B—Same	61	47
C—Same	63	48
D—Same	67	51
E—Same	75	60
Testimony of J. S. Walters	79	63
Assignments of error	116	84
Motion for taxation of attorney's fees	117	86
Objections	119	87
Judgment	120	88
Opinion, Flansburg, J.	122	89
Remittitur	138	96
Judgment	139	97
Motion to retax costs	139	98
Judgment	141	99
Motion for rehearing	141	99
Judgment denying rehearing	143	101
Motion to withhold mandate, etc	144	101
Final judgment	145	102
Supersedeas bond on error	146	103
Petition for writ of error	149	104
Assignments of error	155	106
Citation and service	160	109
Writ of error	163	110
Præcipe for record	167	111
Certificate of lodgment	171	113
Authentication of record	173	114
Return to writ of error	174	114

a

No. 21056.

NYE-SCHNEIDER-FOWLER COMPANY

v.

CHICAGO & N. W. R. COMPANY.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the Capitol in the City of Lincoln, in said State on the 20th day of September, 1920.

Present:

Hon. Andrew M. Morrissey, Chief Justice.
Hon. Charles B. Letton, Judge.
Hon. William B. Rose, Judge.
Hon. James R. Dean, Judge.
Hon. Chester H. Aldrich, Judge.
Hon. George A. Day, Judge.
Hon. Leonard A. Flansburg, Judge.

Attest:

H. C. LINDSAY,
Clerk.

b On May 5, 1919, there was filed in the office of the Clerk of said Supreme Court of Nebraska, in the foregoing entitled case, a transcript of the record and proceedings had in the district court of Dodge county, and the following are true copies of such portions of said transcript as are called for and demanded in the præcipe on error proceedings to the Supreme Court of the United States:

1 Pleas Before the District Court of the Sixth Judicial District of Nebraska in and for Dodge County, at a Term Thereof Begun and Holden in the City of Fremont, in Said County and State, on the 31 Day of August, One Thousand Nine Hundred and Eighteen.

Present:

Honorable Frederick W. Button, Judge.
P. T. Mitterling, Clerk.

Be it remembered, that heretofore, to wit, on the 31 day of August, 1918, there was filed a Petition in the office of the Clerk of the said Court in the words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

NYE-SCHNEIDER-FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Petition.

Comes now the plaintiff and for cause of action herein states:

A. The plaintiff is now and during all of the times herein mentioned has been a corporation organized and doing business under the laws of Nebraska and with its headquarters at Fremont, Nebraska, and with branch offices at several stations in the state of Nebraska and South Dakota as hereinafter more particularly stated.

B. The defendant is a corporation organized and doing business under the laws of Illinois with reference to railway companies,
2 and as such railway company is a common carrier of freight for hire, and has been so organized and engaged in said business during all of the times hereinafter mentioned.

C. The plaintiff is and has been during all of the times herein mentioned engaged in the business of buying, shipping and selling live stock, including hogs.

D. Heretofore the plaintiff shipped, over the line of the defendant, hogs in carload lots as hereinafter more specifically stated. Said shipments were made by the plaintiff as consignor and were shipped to South Omaha, Nebraska, to the Standard Live Stock Commission Co., as consignee and were from the stations on the line of the defendant as hereinafter stated. All of said shipments were wholly within the state of Nebraska.

E. In said shipments of hogs the plaintiff suffered loss by reason of the negligence of the defendant. In none of said shipments was there a caretaker in behalf of the plaintiff accompanying stock and the plaintiff has no means of knowing and cannot state the particular act or omission of the defendant which constituted the negligence, except where the negligence was occasioned by delay in transit, which is specifically stated hereinafter.

F. As to the hogs which were crippled, plaintiff is unable to *to* state the particular nature of the injury, for the reason that said hogs were shipped to a market handling hogs on a very large scale, and in the conduct of the handling of said hogs at the public stock yards to which they were consigned, no record is kept of the particular manner in which a hog is crippled but a record is made simply of the fact that the hog is crippled and it is impossible for witnesses to remember any specific instances except as disclosed by the records.

G. Hereto attached, marked exhibits A and made a part hereof,
3 is a printed form of contract of shipment which was involved in each of the shipments herein mentioned.

H. In each of the shipments involved herein all of the animals shipped were delivered to the defendant in good physical condition and good health, and in proper condition for shipment with reasonable and ordinary care on the part of the defendant.

I. The plaintiff has suffered damages by reason of the defendant's negligence in the various amounts hereinafter mentioned with reference to each shipment. No part of said damage has been paid and there is now due and unpaid from the defendant to the plaintiff the several amounts mentioned in connection with each of the several shipments hereinafter mentioned together with interest thereon at seven per cent per annum from March 5th, 1918.

J. In the various shipments hereinafter mentioned where reference is made to a crippled hog or hogs, it means that said hogs were crippled by the negligence of the defendant as above stated while in transit as a part of the respective shipments. Where reference is made to excess shrinkage, it means a shrinkage of weight in transit over and above a common usual or ordinary shrinkage, it being conceded by the plaintiff that some shrinkage is proper in all cases. In putting the amount of shrinkage, account is taken only of the excess over and above the common or proper shrinkage, said excess shrinkage being occasioned by delay in transit or by want of care of said livestock while in transit. Where reference is made to hogs lost, it means that one or more hogs were delivered by the plaintiff to the defendant for carriage which were never returned by defendant to plaintiff, but were lost in transit through the negligence of the defendant. Where reference is made to dead hogs, it means that the one or more hogs involved died while in transit through the negligence of the defendant. The amount of dollars named in connection with each shipment is the amount of damage that the plaintiff suffered by reason of the negligence of defendant resulting in the loss or injury therein mentioned.

K. In each of the item numbers hereafter mentioned, a
4 claim in writing was filed with the defendant by the plaintiff for said loss, and has been wholly rejected by the defendant, the defendant refusing to pay any amount whatever. Said claims were filed in each case within sixty days from the date of the delivery of the freight to the defendant.

L. In each of the shipments and claims involved herein claims in writing were filed with the agent of the defendant at South Omaha, Nebraska, the destination of said shipments and which was upon the line of the defendant and at which point the defendant maintained an office. Each of said claims was in writing and stated the nature and amount of the claim, was each accompanied by a bill of lading or duplicate bill of lading or shipping receipt showing the amount paid for or on account of said shipment and said claims in

each of said cases were so filed within sixty days from the date of delivery of such car of freight at destination and remained with the defendant for more than ninety days.

M. Each of the allegations in these paragraphs A to L inclusive are, without repetition made a part of the several causes of action hereinafter presented; that is, paragraphs A to L inclusive, plus paragraph 1, constitutes plaintiff's first cause of action; and paragraph A to L inclusive plus paragraph 2 constitutes plaintiff's second cause of action and so on to the end.

1. Cars number 19153 and 7705 shipped from Nickerson February 23rd, 1917 and through the negligence of the defendant, the car was wrecked in the yard at Nickerson and required to be unloaded and reloaded in another car. The delay caused an excess shrinkage of 150 pounds at $12.95 per hundred making plaintiff's damage for shrinkage $19.42. One hog crippled, damage $4.20. Total damage $23.62.

2. Car number 90385 shipped from Wisner February 8th, 1916, one hog crippled, $2.00, one hog short, $17.55. Total damage $19.55

5 3. Car number 4325 shipped from Wisner April 14th, 1916, one hog dead, amount of damage $29.57.

4. Car number 39659 shipped from Wisner June 14th, 1917, one hog crippled, amount of damage $3.16.

5. Car number 39661 shipped from Wisner January 23rd, 1918, one hog dead, amount of damage $22.40.

6. Car number 89899 shipped from Stanton January 15th, 1917, one hog dead, amount of damage $18.60.

7. Car number 19235 shipped from Stanton January 21, 1918, one hog crippled amount of damage, $6.17.

8. Car number 89889 shipped from Oakdale February 20th, 1916, two hogs dead and one hog crippled, amount of damage $14.25.

9. Car number 21027 shipped from Oakdale June 9th, 1916, one hog dead, amount of damage $13.85.

10. Car number 90155 shipped from Oakdale July 2nd 1916, one hog crippled $3.90 one hog dead $49.31. Total damage $53.21.

11. Car number 19101 shipped from Oakdale January 10th, 1917, one hog crippled amount of damage $3.00.

12. Car number 17573 shipped from Oakdale June 22nd, 1916, one hog crippled, amount of damage $3.62.

13. Car number 17169 shipped from Oakdale June 28th, 1917, one hog crippled $3.90, one hog dead $18.34. Total damage $22.24.

14. Car number 11759 shipped from Oakdale February 8th, 1918, one hog dead amount of damage $25.02.

15. Car number 21367 shipped from Clearwater February 2nd, 1916, one hog crippled $1.80 one hog dead $11.14. Total damage $12.94.

16. Car number 17733 shipped from Clearwater May 25th, 1916, one hog crippled, amount of damage $4.20.

17. Car number 88607 shipped from Clearwater June 15th, 1916, one hog crippled, amount of damage $3.30.

18. Car number 38039 shipped from Clearwater July 27th, 1916, one hog crippled, amount of damage $3.75.

6 19. Car number 39751 shipped from Clearwater August 4th, 1916, one hog crippled, amount of damage $3.75.

20. Car number 90541 shipped from Clearwater September 19th, 1916, one hog crippled, amount of damage $3.90.

21. Car number 17773 shipped from Clearwater May 8th, 1917, three hogs dead, amount of damage, $50.61.

22. Car number 89291 shipped from Clearwater December 13th, 1917, one hog crippled, amount of damage $5.04.

23. Car number 21879 shipped from O'Neill February 2nd, 1916, two hogs crippled $4.60, one hog dead $9.10, amount of damage $13.70.

24. Car number 20951 shipped from O'Neill February 7th, 1916, one hog crippled $1.80, two hogs dead $19.00. Total damage, $20.80.

25. Car number 7989 shipped from O'Neill May 31st, 1916, one hog dead amount of damage $15.77.

26. Car number 90369 shipped from O'Neill July 4th, 1916, one hog dead amount of damage $30.90.

27. Car number 86741 shipped from O'Neill September 21, 1915, one hog dead amount of damage $13.04.

28. Car number 3747 shipped from O'Neill October 10, 1916, one hog crippled amount of damage $4.80.

29. Car number 500,411 shipped from O'Neill December 17th, 1916, one hog crippled $1.80, one hog dead $7.68. Total damage $9.48.

30. Car number 19281 shipped from O'Neill April 25th, 1917, one hog cripped amount of damage $7.70.

31. Car number 7735 shipped from O'Neill June 12th, 1917, one hog crippled amount of damage $6.60.

32. Car number 88811 shipped from Emmet March 16th, 1916, four hogs crippled amount of damage, $9.40.

33. Car number 3863 shipped from Emmet April 9th, 1916, one hog dead, amount of damage $17.01.

34. Car number 89377 shipped from Emmet May 11th, 1916, two hogs crippled, amount of damage $7.95.

35. Car number 58897 shipped from Emmet September
7 2nd, 1916, one hog dead, amount of damage $21.53.

36. Car number 16237 shipped from Emmet April 20th, 1917, two hogs crippled, amount of damage $5.40.

37. Car number 4749 shipped from Emmet June 1st, 1917, one hog crippled, amount of damage $3.45.

38. Car number 3481 shipped from Emmet July 28th, 1917, one hog crippled, amount of damage $4.06.

39. Car number 88939 shipped from Johnstown May 26th, 1916, two hogs crippled, amount of damage $6.00.

40. Car number 16983 shipped from Johnstown June 25th, 1916, one hog dead, amount of damage, $20.52.

41. Car number 21019 shipped from Johnstown July 30th, 1916, three hogs dead, amount of damage $71.78.

42. Car number 16985 shipped from Johnstown August 17th, 1916, five hogs dead, amount of damage $117.25.

43. Car number 88903 shipped from Johnstown January 10th, 1917, two hogs dead, damage $80.68, one hog crippled, damage $3.76. Total damage $84.44.

44. Car number 21383 shipped from Johnstown December 8th, 1916, one hog dead amount of damage $12.30.

45. Car number 19865 shipped from Johnstown March 16th, 1917, three hogs dead, amount of damage $73.37.

46. Car number 89223 shipped from Johnstown April 19th, 1917, three hogs crippled, amount of damage $8.85.

47. Car number 21823 shipped from Johnstown May 16th, 1917, one hog crippled, amount of damage $3.00.

48. Car number 20071 shipped from Johnstown July 29th, 1917, two hogs dead, amount of damage $93.42.

49. Car number 88911 shipped from Rushville March 7th, 1916, two hogs crippled, damage $4.95, two hogs dead, damage $29.97. Total damage $34.92.

50. Car number 4425 shipped from Rushville June 11th, 1916, one hog short, amount of damage $37.20.

8 51. Car number 39079 shipped from Rushville January 9th, 1917, two hogs dead $32.01 two hogs crippled $3.87. Total damage $35.88.

52. Car number 3599 shipped from Rushville June 9th, 1917, two hogs short, amount of damage $60.49.

53. Car number 39771 shipped from Bristow March 20th, 1916, one hog dead, amount of damage $17.22.

54. Car number 21827 shipped from Bristow July 7th, 1916, one hog crippled and one hog dead, amount of damage $25.98.

55. Car number 20361 shipped from Bristow January 21st, 1917, four hogs dead, amount of damage $72.64.

56. Car number 89823 shipped from Bristow February 28th, 1917, one hog dead amount of damage $35.40.

57. Car number 86895 shipped from Bristow July 15, 1917, one hog crippled amount of damage, $3.63.

58. Car number 90207 shipped from Spencer August 1st, 1917, one hog dead, amount of damage $22.19.

59. Car number 61653 shipped from Spencer March 3rd, 1918, one hog crippled amount of damage $6.91.

60. Car number 21571 shipped from Anoka February 1st, 1916, two hogs crippled, damage $4.50, five hogs dead, damage $76.64, Total damage $81.14.

61. Car number 16843 shipped from Anoka February 29th, 1916, two hogs crippled, amount of damage $3.00.

62. Car number 90591 shipped from Anoka March 18th, 1916, one hog dead, amount of damage $13.31.

63. Car number 17773 shipped from Anoka April 7th, 1916 one hog crippled, amount of damage $3.70.

64. Car Number 88943 shipped from Anoka July 19th, 1916, one hog dead amount of damage, $24.75.

65. Car number 37882 shipped from Anoka July 31st, 1916, one hog crippled, amount of damage $6.45.

9 66. Car number 89333 shipped from Anoka October 29th, 1916, one hog dead amount of damage $17.30.

67. Car number 38048 shipped from Anoka April 1st, 1917, two hogs crippled amount of damage $5.88.

68. Car number 4859 shipped from Anoka January 4th, 1917, two hogs crippled amount of damage $3.84.

69. Car number 17599 shipped from Howells December 22nd, 1916, one hog dead amount of damage $5.49.

70. Car number 89419 shipped from Howells December 27th, 1916, two hogs crippled, damage $3.30, one hog dead Damage $11.05, Total damage $14.35.

71. Car number 89389 shipped from Howells December 29th, 1916, one hog dead, amount of damage $10.93.

72. Car number 89003 shipped from Howells January 9th, 1917, one hog crippled, amount of damage $3.33.

73. Cars number 25031 and 20741 shipped from Howells, February 7th, 1917, one hog crippled, amount of damage $3.15.

74. Car number 17487 shipped from Howells July 17th, 1917 one hog dead, amount of damage $20.40.

75. Car number 17793 shipped from Howells July 24th, 1917, one hog dead amount of damage $49.73.

76. Car number 89673 shipped from Howells February 10th, 1918, one hog crippled amount of damage $6.82.

77. Car number 34461 shipped from Leigh January 24th, 1916, one hog crippled, amount of damage $3.50.

78. Car number 90231 shipped from Leigh March 28th, 1916, one hog crippled damage $2.70 one hog short, damage $17.55. Total damage $20.25.

79. Car number 7707 shipped from Leigh April 17th, 1917 one hog crippled amount of damage $3.00.

80. Car number 17977 shipped from Creston February 19th, 1917 two hogs crippled, amount of damage $7.95.

81. Car number 90459 shipped from Creston March 16th, 1917, one hog crippled amount of damage $4.35.

10 82. Car number 90183 shipped from Cornlea September, 1st, 1916, one hog short, amount of damage $24.02.

83. Car number 20111 shipped from Newman Grove May 9th, 1916, one hog dead, amount of damage $11.90.

84. Car number 21205 shipped from Newman Grove May 31st, 1916, one hog crippled amount of damage $8.82.

85. Car number 89299 shipped from Newman Grove September 25th, 1916, one hog crippled, amount of damage $3.00.

86. Car number 19185 shipped from Newman Grove March 11th, 1917, one hog crippled amount of damage $4.05.

87. Car number 4961 shipped from Colon January 12th, 1917, two hogs crippled amount of damage $6.45.

88. Car number 89915 shipped from Colon October 9th, 1917, two hogs crippled amount of damage $10.80.

89. Car number 4599 shipped from Swedeburg May 1st, 1916, one hog dead amount of damage $22.95.

90. Car number 89523 shipped from Swedeburg June 10th, 1916, one hog dead amount of damage $24.80.

91. Car number 4801 shipped from Swedeburg July 25th, 1916, three hogs dead amount of damage $67.43.

92. Car number 17473 shipped from Swedeburg September 14th, 1916, two hogs crippled amount of damage $10.35.

93. Car number 3599 shipped from Swedeburg January 18th, 1916, two hogs crippled amount of damage $4.10.

94. Car number 19579 shipped from Swedeburg January 22nd, 1917, one hog crippled, amount of damage $4.05.

95. Car number 87267 shipped from Swedeburg June 21st, 1917, one hog dead amount of damage $29.65.

96. Car number 89821 shipped from Davey April 14th, 1916, one hog short amount of damage $20.82.

97. Car number 20029 shipped from Davey March 22nd, 1917, one hog crippled amount of damage $3.00.

98. Car number 3011 shipped from Brainard June 12th,
11 1916, one hog dead amount of damage $31.92.

99. Car number 25111 shipped from Brainard June 13th, 1916, one hog dead, amount of damage $40.32.

100. Car number 17047 shipped from Brainard July 5th, 1916, one hog dead, damage $26.58, one hog crippled damage $3.69. Total damage $30.27.

101. Car number 88519 shipped from Brainard January 10th, 1917, three hogs crippled amount of damage $11.85.

102. Car number 7951 shipped from Goehner June 15th, 1917, one hog crippled amount of damage $3.45.

103. Car number 19795 shipped from Goehner November 13th, 1916, one hog crippled, amount of damage $3.30.

104. Car number 17663 shipped from Surprise January 24th, 1916, two hogs crippled amount of damage $5.20.

105. Car number 88417 shipped from Surprise March 15th, 1916, one hog dead amount of damage $15.77.

106. A reasonable amount for attorneys' fees in behalf of the plaintiff is $900.00.

Wherefore plaintiff prays judgment against the defendant for the sum of $2,097.21 together with interest and costs, and further prays the recovery of $900.00 attorney's fee to be taxed by the court as costs.

COURTRIGHT, SIDNER AND LEE,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Dodge County, ss:

I, W. J. Courtright, being first duly sworn, depose and say that I am one of the attorneys for the plaintiff in the above entitled action, that said plaintiff is a corporation and that the facts stated in the foregoing petition are true as I believe.

W. J. COURTRIGHT.

Subscribed in my presence and sworn to before me this 31st day of August, 1918.

EARL J. LEE,
[SEAL.] *Notary Public.*

12 And afterwards on the 1st day of November, 1918, there was filed in the office of said Clerk a certain Answer in words and figures following to-wit:

In the District Court of Dodge County, Nebraska.

Case 6096.

NYE-SCHNEIDER-FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Answer.

Comes now the defendant and for answer to plaintiff's petition admits the allegations of Paragraph A. thereof; admits the allegations of paragraph B thereof; admits the allegations of paragraph C thereof; admits the allegations of paragraph D thereof so far as the date, point of shipment, shipper and consignee and destination are concerned, only. Admits the allegations of paragraph G. thereof.

2.

And defendant denies each and every allegation in said petition contained not hereinbefore specifically admitted to be true.

3.

Further answering defendant alleges that if any of the hogs mentioned in plaintiff's petition were dead or crippled at the time same were unloaded at destination from defendant's cars, that such death or disability was due to natural causes; to the inherent nature and disposition of hogs to injure themselves and each other during transportation to natural diseases such as cholera, arthritis, pneumonia and other diseases that some of said hogs were dead when loaded at

point of origin; that others of said animals were weak and diseased when loeaded at point of origin; that others of said animals were crippled and lame when loaded at point of origin and defendant alleges that none of said death or said disability of said animals was due to any negligence of the defendant or any transportation cause for which defendant is liable.

4.

13 Further answering defendant denies that plaintiff is entitled to recover an attroney's fee in this case for the reason that Section 6063 Revised Satutes of Nebraska, 1913, under which attorney's fee is claimed is null and void because same if enforced will deprive defendant of its property without due proof of law and will deny to the defendant equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States; that said pretended Statute is null and void because it assumes to regulate interstate commerce if enforced and defendant alleges that said statute and the whole of it has been superseded by the interstate commerce law and is inapplicable and void.

Wherefore defendant prays that plaintiff's suit be dismissed for costs.

——— ———,
——— ———,
Attorneys for Defendant.

STATE OF NEBRASKA,
County of Douglas, ss.

Wymer Dressler, being first duly sworn on oath deposes and says that he is attorney for the above named defendant a corporation; that as such attorney he has read the foregoing answer and knows the contents thereof and the statements and averments therein contained are true as he believes.

WYMER DRESSLER.

Subscribed and sworn to before me this 31st day of October, A. D. 1918.

[SEAL.]

RUTH LEVEY,
Notary Public in and for Douglas County.

And afterwards on the 28th day of January, 1918, there was filed in the office of said Clerk, a certain Reply in words and figures following, to-wit:

11 In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Reply.

Comes now the plaintiffs for reply to defendant's answer, deny each and every allegation therein contained, except such as is admitted by the petition.

COURTRIGHT, SIDNER & LEE,
Attorneys for Plaintiff.

And afterwards on the 28th day of January, 1919, there was entered of record a certain Journal Entry in words and figures following, towit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Journal Entry.

Case called, trial proceeds, jury duly impanelled and sworn. Trial proceeds.

And afterwards, on the 29th day of January, 1919, there was entered of record, a certain Journal Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Journal Entry.

Trial proceeds.

And afterwards on the 30th day of January, 1919, there was entered of record, a certain Journal Entry in words and figures following, to-wit:

15 In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Journal Entry.

Trial continued.

And afterwards on the 31st day of January, 1919, there was entered of record in the office of said Clerk, a certain Journal Entry in words and figures following, towit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Journal Entry.

Troal Proceeds.

And afterwards on the 1st day of February, 1919, there was filed in the office of said clerk certain Instructions by the court on his own motion, words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Instructions.

Instruction No. 1 Given.

The court instructs the jury that the matters alleged in plaintiff's petition, not admitted in the answer and put in issue by the answer are in substance as follows:

That plaintiff shipped over the line of the defendant certain hogs which were delivered to defendant in good condition and were crippled or killed or lost by and through the negligence of defendant while in transit. That said hogs were shipped under contract and plaintiff claims a copy is attached to the petition and is in evidence before you.

16 Plaintiff asks judgment against the defendant in the sum of $1,588.14 with interest thereon at the rate of 7% per annum. A statement giving "Item No.", "Place shipped from", "Nature of Claim," and "Amount Claimed" is attached and made a part of these instructions for your convenience, as follows, towit:

The plaintiff since filing its petition in this court has withdrawn some of the items or shipments mentioned in the petition, and therefore has withdrawn the evidence with reference to some of such items. As so reduced, the plaintiff now claims judgment against the defendant upon the following items:

Item number.	Shipped from—	Nature of claim.	Amount claimed.
1.	Nickerson	1 hog crippled	4.20
		Excess shrinkage	19.42
2.	Wisner	1 hog crippled	2.00
		1 hog short	17.55
4.	"	1 hog crippled	3.16
6.	Stanton	1 hog dead	18.60
9.	Oakdale	1 hog dead	13.85
10.	"	1 hog crippled	3.90
		1 hog dead	49.31
11.	"	1 hog crippled	3.00
12.	"	1 hog crippled	3.62
16.	Clearwater	1 hog crippled	4.20
17.	"	1 hog crippled	3.30
18.	"	1 hog crippled	3.75
19.	"	1 hog crippled	3.75
20.	"	1 hog crippled	3.90
21.	"	3 hogs dead	50.61
22.	"	1 hog crippled	5.04
23.	O'Neill	2 hogs crippled	4.60
		1 hog dead	9.10
24.	"	1 hog crippled	1.80
		2 hogs dead	19.00
25.	"	1 hog dead	15.77
26.	"	1 hog dead	30.90
28.	"	1 hog crippled	4.80
17			
29.	O'Neill	1 hog crippled	1.80
		1 hog dead	7.68
32.	Emmet	4 hogs crippled	9.40
33.	"	1 hog dead	17.01
35.	"	1 hog dead	21.53
36.	"	2 hogs crippled	5.40
37.	"	1 hog crippled	3.45
38.	"	1 hog crippled	4.06
39.	Johnstown	2 hogs crippled	6.00
40.	"	1 hog dead	20.52
41.	"	3 hogs dead	71.78
42.	"	5 hogs dead	117.25
45.	"	3 hogs dead	73.37
46.	"	3 hogs crippled	8.85
47.	"	1 hog crippled	3.00
48.	"	2 hogs dead	93.42

Item number.	Shipped from—	Nature of claim.	Amount claimed.
49.	Rushville	2 hogs crippled	4.95
		2 hogs dead	29.97
51.	"	2 hogs dead	32.01
		2 hogs crippled	3.87
52.	"	2 hogs short	60.49
53.	Bristow	1 hog dead	17.22
54.	"	(1 hog crippled) / 1 hog dead (	25.98
55.	"	4 hogs dead	72.64
56.	"	1 hog dead	35.40
58.	Spencer	1 hog dead	22.19
60.	Anoka	1 hog crippled	2.20
		5 hogs dead	76.64
62.	"	1 hog dead	13.31
63.	"	1 hog crippled	3.70
64.	"	1 hog dead	24.75
66.	"	1 hog dead	17.30
67.	"	2 hogs crippled	5.88
68.	"	2 hogs crippled	3.84
78.	Leigh	1 hog short	17.55
79.	"	1 hog crippled	3.00
18			
83.	Newman Grove	1 hog dead	11.90
84.	" "	1 hog crippled	8.82
85.	" "	1 hog crippled	3.00
86.	" "	1 hog crippled	4.05
87.	Colon	2 hogs crippled	6.45
88.	"	2 hogs crippled	10.80
89.	Swedeburg	1 hog dead	22.95
90.	"	1 hog dead	24.80
91.	"	3 hogs dead	67.43
92.	"	2 hogs crippled	10.35
93.	"	2 hogs crippled	4.10
95.	"	1 hog dead	29.65
96.	Davey	1 hog short	20.82
97.	"	1 hog crippled	3.00
98.	Brainard	1 hog dead	31.92
99.	"	1 hog dead	40.32
100.	"	1 hog dead	26.58
		1 hog crippled	3.69
104.	Surprise	2 hogs crippled	5.20
105.	"	1 hog dead	15.77
	Total besides interest		$1,588.14

Instruction No. 2 Given.

The court instructs the jury that the defendant in its answer denies each and every allegation contained in the petition and submitted to

the consideration of the jury in Instruction No. 1 hereof. Defendant alleges further that such of plaintiff's hogs as were dead or crippled by natural causes; to the inherent nature and disposition of hogs to injure themselves and each other during transportation; to natural diseases and that some were loaded dead and others crippled and that none of the disabilities were due to negligence of defendant.

Defendant prays that plaintiff's causes of action be dismissed.

19 Instruction No. 3 Given.

The court instructs the jury that the allegations of new matter contained in the answer are put in issue by a reply in the form of a general denial.

Instruction No. 4 Given.

The burden of proof is upon any one in litigation to establish by a preponderance of the evidence, in maintaining his cause of action or defense, such several allegations as he asserts that are material to such one's success in the action, unless such allegations are admitted by the opposing side. Any one under such burden, not supporting such contentions by a preponderance of the evidence, has them concluded against him. Where the evidence is evenly balanced, or preponderates in favor of the other party, on any point, then such one under such burden as to such point cannot prevail. By "a preponderance of the evidence" is meant the weight of the evidence, that evidence which on the whole is the most satisfactory when arrayed against the evidence in opposition thereto.

Instruction No. 5 Given.

The court instructs the jury that the defendant is not liable for the death, crippling or loss of any hogs involved in this action, unless occasioned by defendant's negligence in process of transportation.

Instruction No. 6 Given.

The court instructs the jury that if the plaintiff has shown the hogs were delivered to defendant in good condition, but some were received at destination in bad condition, then it has made a prima facie case of negligence against the defendant as to such animals delivered in poor condition and the burden is upon the defendant to show by preponderance of all the evidence that it was not guilty of negligence or that the loss was due to some cause beyond defendant's control.

20 Instruction No. 7 Given.

You are instructed that if you find from a preponderance of the evidence that the company defendant received the hogs in question in good order at the time and place where received for shipment to place of destination thereto be delivered to the consignee, and that

said defendant company failed to deliver said hogs or some portion thereof to the consignee, or delivered some of them dead or in a crippled condition at said place of destination, then as to such hogs, so received in good order and not delivered in good order, you will find for the plaintiff, unless you further find by a preponderance of the evidence that the defendant's failure to deliver said hogs or some portion thereof to the consignee at said destination was due to the act of God or unavoidable accident or resulting from the nature and propensity of the animals of that character, or unless defendant has overcome the presumption this raised by evidence and has established that said loss or losses, if any were occasioned in some way other than through defendant's negligence.

Instruction No. 8 Given.

The court instructs the jury that if you find from a preponderance of the evidence that said hogs were received by defendant in good condition but arrived dead, or crippled or failed to arrive then the burden is upon defendant to show by a preponderance of the evidence that the loss was due to natural causes, unavoidable accident or other cause beyond the control of defendant, and that defendant's negligence was not the proximate cause.

Instruction No. 9 Given.

If you find for the plaintiff on any one or more of the several causes of action herein set out, then the measure of plaintiff's recovery on such cause or causes of action will be the reasonable market value of said hog or hogs at the place of destination at the time they should have been delivered, less the reasonable market value of such hog or hogs at the place of destination in the condition that said hogs were so delivered.

21 Instruction No. 10 Given.

You are the judges of the credibility of the witnesses and of the weight to be allowed for the testimony of each. In determining this, you should carefully canvass and consider the testimony of each witness; ascertain systematically, calmly and deliberately what interest, or want of interest each witness may have in the result of the suit, as shown by the evidence; what bias or prejudice if any is shown, the witness has, whether in your deliberate judgment the facts related by the witness are reasonable or unreasonable, probable or improbable.

You should also consider the demeanor of the witness upon the witness stand, his apparent intelligence or want of intelligence; whether his testimony is given promptly, clearly and intelligently; consider all the facts shown to exist that will aid you in properly weighing the testimony of each witness. And, in this manner, appealing to your own experience and knowledge of men and of the affairs of Mankind, and in *the* own best judgment, examine meas-

ure and weigh the evidence of each witness, and then give to it such effect as you think it fairly and justly entitled to.

Blank verdicts will be furnished you with these instructions. Your foreman will sign the one to which you may agree.

FREDERIC W. BUTTON,
Judge.

And also there was filed in the office of said clerk on the 1st day of February, 1919, instructions asked by the plaintiff, in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Instruction Number One Asked by Plaintiff.

You are instructed that by the statutes of the state of Nebraska when two or more railroads are connected together, the com-
22 pany owning either of such roads receiving freight to be transported to any place of the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight to the consignee of the freight in the same order in which such freight was shipped.

Given.
FREDERIC W. BUTTON,
Judge.

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Instruction Number Two Asked by Plaintiff.

If you find from a preponderance of the evidence in this case that the defendant utilized the facilities and services of Union Stockyards Company of South Omaha for the delivery to the consignee of the freight involved in this action, then the defendant is responsible for all of the acts or omissions, if any, of said Union Stockyards Company to the same extent as if the defendant had itself operated said yards and terminal facilities.

Given.
FREDERIC W. BUTTON,
Judge.

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Instruction Number Three Asked by Plaintiff.

A common carrier of livestock for hire is an insurer of its safe delivery to the consignee, except where the injury or loss is due to the act of God, the public enemy, or to the inherent nature
23 or propensities of the animals, the delivery of the animals to the carrier in good condition, and the failure of the carrier to deliver them at the place of destination in the same condition, entitled the owner to a judgment against the carrier, unless the defendant, assuming the burden of proof in this respect, shows by a preponderance of the evidence that the loss or damage resulted from some such cause exempting it from liability.

Given.

FREDERIC W. BUTTON,
Judge.

And also on the 1st day of February, 1919, there was filed in the office of the clerk of the District Court, certain instructions asked by the defendant and granted, in words and figures fol-owing, towit:

In the District Court of Dodge County, Nebraska.

Instruction No. 4.

In determining the cause of the death of such hogs as you may find died during transportation, you may consider whether said hogs died from disease or from climatic conditions, or from the natural disposition of hogs when confined in cars to injure themselves or each other from fighting or otherwise, or from suffocation by reason of the hogs piling upon each other through desire to keep warm during cold weather or as a result of excitement incident to normal transportation by railroad, or from being trampled upon by other hogs in the car or any other natural cause and if you find from the evidence that said deaths were due to any of the causes mentioned in this instruction or for such deaths as you find were so occasioned, the defendant is not liable.

Given by defendant.

Given.

FREDERIC W. BUTTON,
Judge.

Instruction No. 5.

The defendant is not liable for such hogs, if any, as you may find from the evidence were dead when loaded by plaintiff's
24 agents, into defendant's cars for shipment.

Requested by defendant.

Given.

FREDERIC W. BUTTON,
Judge.

Instruction No. 6.

The defendant is not liable for such hogs, if any, which you find were sick when delivered to the defendant for transportation and which died during transportation as the result of such sickness.

Requested by defendant.

Given.

FREDERIC W. BUTTON,
Judge.

Instruction No. 7.

Before you will be justified in finding a verdict for plaintiff, on account of the death of any of the hogs involved in the suit, you must find that said deaths were due to human agency. If the plaintiff has not satisfied you that such deaths were due to human agency, without any fault on plaintiff's part, the defendant is not liable for said dead hogs.

Requested by defendant.

Given.

FREDERIC W. BUTTON,
Judge.

Instruction No. 8.

By the term "human agency" is meant some wrongful act or omission by a human being having a relation of duty toward or responsibility for the shipment which act or omission caused or contributed to the death of said animals.

Requested by defendant.

Given.

FREDERIC W. BUTTON,
Judge.

Instruction No. 9.

Each party in this case is entitled to the benefit of all the evidence in the case which may tend to support its theory, regardless of which party may have offered such evidence.

Requested by defendant.

Given.

FREDERIC W. BUTTON,
Judge.

25

Instruction No. 10.

The defendant is entitled to have you consider the cross examination of plaintiff's witnesses, as evidence in favor of defendant wherever such testimony tends to support defendant's theory of the case, to the same extent as though such testimony had been given by witnesses offered by defendant.

Requested by defendant.

Given.

FREDERIC W. BUTTON.

Instruction No. 14.

In considering the cause of the death of these hogs, where the evidence may tend to show that they died during transportation, you are entitled to take into account your own knowledge as men of experience concerning the general and commonly known characteristics of hogs.

Requested by defendant.

Given.

FREDERIC W. BUTTON.

Instruction No. 16.

You are instructed that as to those items in plaintiff's petition where plaintiff claims that a hog or hogs were lost by the defendant during transportation, the burden is upon the plaintiff to establish such loss by a fair preponderance of the testimony. If you believe that any such discrepancies in the numbers of hogs claimed to have been loaded by plaintiff at loading point, and the number claimed to have been delivered to the consignee at South Omaha, can be accounted for by errors in making the count at either end of the transportation or by errors in making records of such counts, if any such errors appear from the testimony then such alleged loss as to said items has not been proved. In other words, you must be able

to find as a fact that such loss actually occurred during transportation. If you do not so find, then as to such items it is your duty to find for the defendant.

Requested by the defendant.

Given by
FREDERIC W. BUTTON,
Judge.

26 *Instruction No.* 18.

You are instructed that as to such items in which it appears that plaintiff's hogs were mixed in with hogs belonging to other persons and you are unable to determine whether it was plaintiff's hogs or the other party's hogs which may have been dead or injured at destination, you will not allow the plaintiff anything thereon.

Requested by defendant.

Given by
FREDERIC W. BUTTON,
Judge.

Instruction No. 19.

You are instructed that as to such items, if any, where it appears from the testimony that plaintiff has required the other party shipping hogs in the load to share the loss to the shipment, by reason of death or alleged injury at destination, plaintiff cannot recover the amount or amounts, if any, contributed by such other parties.

Requested by defendant.

Given by
FREDERIC W. BUTTON,
Judge.

And also on the 1st day of February, 1919, there was filed in the office of said clerk, certain instructions by the defendant refused, in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Instructions Requested by Defendant.

Comes now defendant at the close of all testimony and requests the court to give to the jury the following instructions in its behalf.

WYMER DRESSLER,
Attorney for Defendant.

27 *Instruction Number* 1.

You are instructed to return a verdict for defendant.

Refused.

FREDERIC W. BUTTON,
Judge.

Instruction Number 2.

There being no evidence in this case that any of the hogs claimed to have been crippled, were crippled when unloaded from defendant's cars at point of destination, you will not allow plaintiff anything upon its claims for crippled animals.

Refused.

FREDERIC W. BUTTON,
Judge.

Instruction Number 3.

The defendant is not liable for the death of any of the hogs involved in this case, unless such deaths were the result of defendant's negligence.

Refused.

FREDERIC W. BUTTON,
Judge.

Instruction Number 11.

The burden is upon the plaintiff to show that the hogs not only died during transportation but that such deaths were due to defendant's negligence.

Refused.

FREDERIC W. BUTTON,
Judge.

Instruction Number 12.

If plaintiff has not satisfied you by the evidence in this case that said hogs died during transportation as the result of defendant's negligence, you cannot allow plaintiff anything on its claims for dead hogs.

Refused.

FREDERIC W. BUTTON,
Judge.

Instruction Number 13.

The plaintiff is bound by the terms of the shipping con-
28 tracts under which each of the shipments in question were made and if you should find for plaintiff, cannot in any event recover damages in *in* excess of the valuation in such contracts expressed.

Refused.
FREDERIC W. BUTTON,
Judge.

Instruction Number 15.

If your verdict is for plaintiff, you will state therein on which causes of action, specifying the same by car numbers and item numbers, damages are allowed, and the amount of damages al-owed on each cause of action.

Refused.
FREDERIC W. BUTTON,
Judge.

Instruction Number 17.

You are instructed that under the contracts of shipment involved in all of the causes of action sued upon in this case, the defendant is not liable for any deaths, crippling or loss of animals not occurring on its own line, and you are not at *liable* (liberty) to find defendant liable for any damages due to death crippling or loss of hogs which, you may find, occurred while the shipments were in the hands of the Union Stockyards Company at South Omaha.

Refused.
FREDERIC W. BUTTON,
Judge.

And also on the 1st day of February, 1919, there was entered of record in the office of said Clerk a certain Journal Entry in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Journal Entry.

Jury duly instructed, arguments made and jury retired for deliberation.

29 And also on the 1st day of February, 1919, there was filed in the office of said clerk, a certain Verdict in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Verdict.

We, the jury duly impaneled in the above entitled case find for the plaintiff and against the defendant and assess the amount of his recovery at $802.27 with interest at 7%.

(Signed) W. A. GRAHAM,
Foreman.

And afterwards on the 24th day of February, 1919, there was entered of record a certain Journal Entry in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Journal Entry.

On this 1st day of February, 1919, the jury returns a verdict in favor of the plaintiff for $802.27 and in pursuance thereto it is ordered that the plaintiff have and recover of and from the defendant $802.27 with interest on said amount at 7 per cent per annum.

And afterwards on the *the* 4th day of February, 1919, there was entered of record in the office of said clerk, a certain Motion for New Trial, in words and figures following, to-wit:

30 In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant and moves the court that the verdict of the jury heretofore filed herein and the judgment of the court

thereon be vacated, set aside and held for naught, and a new trial granted in said cause for the following reasons:

1.

The verdict is not sustained by sufficient evidence.

2.

The verdict is contrary to law.

3.

The verdict is the result of passion and prejudice on the part of the jury.

4.

Errors of law occurring at the trial to which the defendant duly excepted.

5.

The court erred in holding the defendant liable for the faults of the Union Stock Yards Company, a connecting carrier in violation of the contract of shipment and by such holding deprived the defendant of its property without due process of law and denied to the defendant the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and in volation of the Constitution of Nebraska, because the pretended Statute of Nebraska which the court gave to the jury in his instructions at plaintiff's request is unconstitutional and void for the reasons herein specified.

6.

The verdict is excessive.

31 7.

The court erred in refusing to direct a verdict for the defendant upon the causes of action specified in defendant's motion for an instructed verdict made at the close of all the testimony.

8.

The court erred in giving to the jury instruction number one on its own motion.

9.

The court erred in giving to the jury instruction number two on its own motion.

10.

The court erred in giving to the jury instruction number three on its own motion.

11.

The court erred in giving to the jury instruction number four on its own motion.

12.

The court erred in giving to the jury instruction number five on its own motion.

13.

The court erred in giving to the jury instruction number six on its own motion.

14.

The court erred in giving to the jury instruction number seven on its own motion.

15.

The court erred in giving to the jury instruction number eight on its motion.

16.

The court erred in giving to the jury instruction number nine on its own motion.

17.

The court erred in giving to the jury instruction number ten on its own motion.

32

18.

The court erred in refusing to give to the jury instruction number one requested by the defendant.

19.

The court erred in refusing to give to the jury instruction number two requested by the defendant.

20.

The court erred in refusing to give to the jury instruction number three requested by the defendant.

21.

The court erred in refusing to give to the jury instruction number four requested by the defendant.

22.

The court erred in refusing to give to the jury instruction number five requested by the defendant.

23.

The court erred in refusing to give to the jury instruction number six requested by the defendant.

24.

The court erred in refusing to give to the jury instruction number seven requested by the defendant.

25.

The court erred in refusing to give to the jury instruction number eight requested by the defendant.

26.

The court erred in refusing to give to the jury instruction number nine requested by the defendant.

27.

The court erred in refusing to give to the jury instruction number ten as requested by the defendant.

28.

The court erred in refusing to give to the jury instruction number eleven requested by the deefndant.

29.

The court erred in refusing to give to the jury instruction
33 number twelve requested by the defendant.

30.

The court erred in refusing to give to the jury instruction number thirteen reques- by the defendant.

31.

The court erred in refusing to give to the jury instruction number fourteen requested by the defendant.

32.

The court erred in refusing to give to the jury insturction number fifteen requested by the defendant.

33.

The court erred in refusing to give to the jury instruction number sixteen requested by the defendant.

34.

The court erred in refusing to give to the jury instruction number seventeen requested by the defendant.

35.

The court erred in refusing to give to the jury instruction number eighteen requested by the defendant.

36.

The court erred in refusing to give to the jury instruction number nineteen requested by the defendant.

37.

The court erred in giving to the jury instruction number one at request of the plaintiff.

38.

The court erred in giving to the jury instruction number two at request of the plaintiff.

39.

The court erred in giving to the jury instruction number three at request of plaintiff.

40.

The court erred in overruling defendant's objections to the evidence offered by plaintiff contained in the Union Stock Yards
34 record book as testified to by the witness, Leidlaw, which evidence was incompetent and hearsay and prejudicial.

WYMER DRESSLER,
C. H. GORMAN,
Attorneys for Defendant.

And afterwards on the 4th day of February, 1919, there was filed in the office of said clerk a certain Motion in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Motion for Taxation of Attorneys' Fees as Costs.

Come now plaintiff and Courtright, Sidner & Lee, attorneys for plaintiff and show the court as follows:

This case as finally submitted to the jury involved suit for recovery on seventy-one s-parate causes of action the final recovery under the verdict of the jury amounting to more than $800.00 In each of said seventy-one causes of action, except item #39, involving a claim of $6.00 and item #40, involving a claim of $20.52, a claim in writing was filed with the agent of the defendant at South Omaha, Nebraska, the destination of the shipments involved, which destination was upon the line of the defendant and at wh-ch point the defendant maintained an office. Each of said written claims stated the nature and amount of the claim and was each accompanied by a bill of lading or duplicated bill of lading or shipping receipt showing the amount paid for or on account of said shipment and said claims were in each case so filed within ninety days from the date of delivery of each car of freight at destination and remained with the defendant for more than ninety days. Each of said shipments and each of said seventy-one causes of action involved a claim for loss or dam-
35 age to livestock shipped wholly within the state of Nebraska, said claims being against a railroad engaged in the business of a common carrier for hire as shown in the petition. This case involved a claim for recovery on seventy-one separate cars of hogs shipped from various stations to South Omaha, Nebraska, on various dates. The necessary legal preparation for trial and trial involved a great deal of work on the part of the attorney for plaintiff, both personally and in giving legal instruction and supervision to plaintiff's claim agent. An examination of the records at the place of shipment and an extensive examination of the records of Union Stock Yards Company at South Omaha, Nebraska, and of the records of the account sales and a cross-checking of all of these was necessary and involved a great deal of time on the part of attorneys for plaintiff. Plaintiff's attorney made two trips to South Omaha, leaving before breakfast in the morning for the taking of testimony at South Omaha. There were various conferences with the attorney for the defendant with reference to stipulating with a view to shortening and expediting the trial, some of which conferences — successful and resulted in a material shortening of the evidence and the time of

trial. The actual trial in court involved four days and was participated in by W. J. Courtright and S. S. Sidner in behalf of the plaintiff. The actual time spent of an attorney for plaintiff in the preparation for trial was much greater than that in the taking of testimony at South Omaha and in the trial. A reasonable attorney's fee is not less than $600.00.

Wherefore plaintiff and their attorneys move the court that there be taxed to the defendant as a part of the costs in this case an attorney's fee in behalf of Courtright, Sidner & Lee in the sum of not less than $600.00.

Reference is had to the affidavits hereto attached marked Exhibit A. and made a part hereof.

NYE SCHNEIDER FOWLER CO.,
By COURTRIGHT, SIDNER & LEE,
Its Attorneys.
COURTRIGHT, SIDNER & LEE.

36 STATE OF NEBRASKA,
Dodge County, ss:

I, W. J. Courtright, being first duly sworn, depose and say that I am an attorney at law, duly admitted to practice in the courts of the state of Nebraska, and have been engaged in such practice continuously for about thirty-one years. My partner, S. S. Sidner, who helped me in the trial of the foregoing case is a regularly practicing attorney in the court of Nebraska with about twenty years' experience. I have been actively identified in the preparation for trial and trial of the foregoing case. I know the contents of the foregoing motion. I have personal knowledge of all of the facts stated in the foregoing motion, except with reference to those statements referring to the filing of claims. I know the extent of legal services rendered and the value thereof. A reasonable attorney's fee to be taxed in behalf of plaintiff's attorneys is not less than $600.00.

W. J. COURTRIGHT.

Subscribed in my presence and sworn to before me this 3rd day of February, 1919.

[SEAL.]

DORIS GUMB,
Notary Public.

STATE OF NEBRASKA,
Dodge County, ss:

I, E. J. Slater, being first duly sworn, depose and say that I am now and for several years last past have been manager of the hog department of the above mentioned plaintiff. The filing of all claims for loss or damage is and has been under my direct care anr supervision. I am familiar with the records and trial in the above entitled action. I have read the allegations of the foregoing motion with reference to the filing of claims, and the statements in said motion with reference to the filing of claims are true.

E. J. SLATER.

Subscribed in my presence and sworn to before me this 3rd day of February, 1919.

[SEAL.] D. B. DAVIES,
Notary Public.

37 And afterwards on the 5th day of February, 1919, there was filed in the office of said clerk a certain Objection at the Taxation of Defendant in words and figures following, to wit:

In the District Court of Dodge County, Nebraska.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Objections of Defendant to the Taxation of Attorney's Fees in Favor of the Plaintiff in This Case.

Comes now the defendant and objects to the allowance of any attorney's fee in this case based upon the alleged authority of Section 6063, Revised Statutes of Nebraska, 1913, and asks that Court to overrule *Plaintiff* Plaintiff's Motion to Tax such attorney's fee for the following reasons:

1.

Said pretended Statute is unconstitutional and void in that same, if enforced would:

(*a*) Deprive the defendant of its property without due process of law and deny to the defendant the equal protection of the law, contrary to Section 1, of the Fourteenth Amendment to the Constitution of the United States.

(*b*) And said Statute, if enforced, will deprive the defendant of its property without due process of law contrary to Section Three of Article One, of the Constitution of Nebraska.

2.

The attorney's fee provided in said Statute is a part of the recovery and on the proof as to the filing of claims thereto, defendant is entitled to a jury trial, notwithstanding the amount of the Attorney's fee is to be fixed by the court and if the Court should hear the proof over these objections and determine whether or not there has been laid the basis for the allowance of such attorney's fee such action by the Court would be in violation of Section Six of Article One of the Cons-itution of Nebraska, guarantying to the defendant
38 the right of trial by jury on said question of fact.

3

Plaintiff has not ... and not accompanied ... receipt, showing the ... amount, and it has no ... amount, with the ... said claims there is ... with said pretended Statute in that it ... same with any bill of lading or shipping ... of freight paid on said several ship... of said claims as claimed in plaintiff's ... destination, but forwarded most of the ... presented direct to Chicago by mail.

WYMER DRESSLER,
H. GORMAN,
Attorneys for Defendant.

STATE OF NEBRASKA,
County of Douglas, ss.

Wymer Dressler, being first duly sworn deposes and says that he is attorney for the above named defendant, that he has read the affidavit of the E. J. Slater attached to the Motion of Plaintiff for the taxing of an attorney's fee as costs in this case; that affiant has possession of all of the claim files involved in this suit; that he has examined the same and that there was not filed in any of the claims, any bill of lading or duplicate thereof or shipping receipt showing the amount paid by plaintiff as freight charges on account of said shipments or any of them; and that many of said claims appear to have been forwarded from Fremont, Nebraska direct to the Claim Agent of the defendant at Chicago Illinois, and were never presented to the agent at destination as provided in Section 6063 Revised Statutes of Nebraska, 1913.

WYMER DRESSLER.

Subscribed and sworn to before me this 4th day of February, 1919, A. D.

[SEAL.]

RUTH LEVEY,
Notary Public in and for
Douglas County, Nebraska.

And afterwards on the 24th day of February, 1919, there was entered of record in the office of said clerk a certain Journal Entry in words and figures following, to-wit:

39 In the District Court of Dodge County, Nebraska.

Case No. 6096.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

On the 24th day of February, 1919, this matter came on for determination on the motion of the defendant for a new trial, said motion having been previously argued and submitted and the court,

being fully advised in the premises, does overrule said motion to which ruling of the court defendant excepts.

This matter came on for further determination on the motion of the plaintiff and Courtright, Sidner & Lee, its attorneys, for the taxation of attorneys' fees as costs, the evidence in support of said motion having been previously taken and said motion argued and submitted to the court, and the court being fully advised in the premises does sustain said motion and does tax against the defendant as costs in this action attorneys' fees in behalf of Courtright, Sidner & Lee, attorneys for plaintiff, in the sum of six hundred dollars, to which ruling order of the court the defendant excepts.

Forty days from the final adjournment of this term of court is allowed in which to prepare and serve bill of exceptions.

By the Court:

FREDERIC W. BUTTON,
Judge.

And on the 4th day of February, 1919, there was filed in the office of said clerk a certain Notice of Appeal in words and figures following, to-wit:

In the District Court of Dodge County, Nebraska.

Case No. 6096.

Doc. 17, Page 82.

NYE SCHNEIDER FOWLER CO., Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

Notice of Appeal.

40 Notice is hereby given that defendant will appeal to the Supreme Court from the judgment of Eight hundred Two and 27/100 Dollars, ($802.27) heretofore rendered against it in this cause.

WYMER DRESSLER,
C. H. GORMAN,
Attorneys for Defendant.

And also on the 4th day of February, 1919, there was filed in the office of said clerk a certain Supersedeas Bond in words and figures following, to-wit:

Supersedeas Bond.

Know all men by these presents: That Chicago and Northwestern Railway Company, a corporation, as principal and National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound *until* Nye Schneider Fowler Co. a corporation,

its successors and assigns, in the penal sum of Two Thousand and no/100 Dollars, ($2,000.00) for the payment whereof well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Yet upon the condition that whereas, on the first day of February, 1919, Nye Schneider Fowler Co. as plaintiff recovered a judgment in the District Court of Dodge County, Nebraska, against Chicago and Northwestern Railway Company, as defendant for $802.27, and to reverse said judgment said defendant intends to appeal to the Supreme Court of Nebraska.

Now therefore if Chicago and Northwestern Railway Company, its successors and assigns shall prosecute said appeal accordingly to law and shall pay said judgment as the same may be affirmed by the Supreme Court, either in whole or in part then this obligation to be void, otherwise to remain in full force and effect.

Dated this third day of February, A. D. 1919.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
By WYMER DRESSLER,
——— ———,
[SEAL.] *Its Attorneys,*
NATIONAL SURETY COMPANY,
By WM. H. WHEELER,
Its Attorney in Fact.

41 The foregoing Bond and Surety thereon are hereby approved this 4th day of February, 1919 A. D.

P. T. MITTERLING,
[SEAL.] *Clerk of the District Court.*

42 And on the 5th day of May, 1919, there was filed in the office of the Clerk of the Supreme Court of Nebraska, a certain Bill of Exceptions in said case, and the following is a true and correct copy of the matters contained in said Bill of Exceptions on Motion for a New Trial and Taxation of Fees, as the same appear on pages 598, red ink figures, to 610, inclusive, said page 610 being the end of said Bill of Exceptions:

43 (*Proceedings on Motion for New Trial and Taxation of Fees.*)

Court: I think the plaintiff is obliged to put in oral evidence on this question in regard to attorney fees. I will sustain the objection. You may go on the stand and testify what the fees are reasonably worth, Mr. Courtright.

Plaintiff excepts.

W. J. COURTRIGHT, being produced, sworn and examined, testified as follows, viz:

Mr. Dressler: The defendant objects to any testimony before the court at this time, as a basis for the allowance of an attorney fee,

under Section 6063 of the Revised Statutes of the State of Nebraska, 1913, for the reason that said statute has been construed by the supreme court of Nebraska to mean that said attorney's fee is a part of the recovery in the case, and, on the proof as to the filing of the claim the defendant is entitled to a jury trial, notwithstanding the amount of the attorney's fee is to be fixed by the court, and, if the court should hear the proof over these objections and determine whether or not there has been laid a bisis for the allowance of said attorney's fee, such action by the court would be in violation of Section 6 Article I of the Constitution of the State of Nebraska, guaranteeing to a defendant the right of trial by jury on a question of fact.

2. Defendant further objects to the introduction of testimony, on this motion of plaintiff for the taxation of an attorney's fee as a part of the costs, for the reason that in said Section 6063 such attorney's fee is not a part of the costs, and the court has no authority to tax the same as costs, said attorney's fee being expressly provided as a part of the recovery in the case, on the allowance of which defendant is entitled to a jury trial, and the jury in this case having been discharged the plaintiff has no right now to ask for the allowance of an attorney's fee.

Court: The matter is now before the court, and the objection is overruled. (Defendant excepts).

Mr. Courtright: I will now offer in evidence our motion for the taxation of an attorney's fee as costs, the same being marked as Exhibit A-½.

Mr. Dressler: We make the same objection we made awhile ago to this motion. (See page 279).

Objection overruled. Defendant excepts.

Plaintiff's Ex. A-½ was here read to the court, viz:

Come now plaintiff and Courtright, Sidner & Lee, attorneys for plaintiff, and show the court as follows:

This case, as finally submitted to the jury, involved suit for recovery on 71 separate causes of action, the final recovery under the verdict of the jury amounting to more than $800.00. In each of said 71 causes of action, except Item #39, involving a claim of $6.00, and Item #40, involving a claim for $20.52, a claim in writing was filed with the agent of the defendant at South Omaha, Nebraska, the destination of the shipments involved, which destination was upon the line of the defendant, and at which point the defendant maintained an office. Each of said written claims stated the nature and amount of the claim, and was each accompanied by a bill of lading, or duplicate bill of lading or shipping receipt, showing the amount paid for or on account of said shipment, and said claims were in each case so filed within 90 days from the date of delivery of each car of freight at destination, and remained with the defendant for more than ninety days. Each of said shipments and each of said 71 causes of action involved a claim for loss or damage to livestock shipped wholly within the

satte of Nebraska, said claims being against a railroad engaged in the business of a common carrier for hire as shown in the petition. This case involved a claim for recovery on 71 separate cars of hogs shipped from various stations to South Omaha, Nebraska, on various dates. The necessary legal preparation for trial and trial involved a great deal of work on the part of attorney for plaintiff, both personally and in giving legal direction and supervision to plaintiff's claim agent. An examination of the records at the place of shipment, and an extensive examination of the records of Union Stock Yards Company at South Omaha, Nebraska, and of the records of the account sales, and a cross-checking of all of these was necessary, and involved a great deal of time on the part of attorneys for plaintiff. Plaintiff's attorney made two trips to South Omaha, leaving before breakfast in the morning for the taking of testimony at South Omaha. There were various conferences with attorney for the defendant with reference to stipulating with a view of shortening and expediting the trial, some of which conferences were successful and resulted in a material shortening of the evidence and the time of trial. The actual trial in court involved four days, and was participated in by W. J. Courtright and S. S. Sidner in behalf of plaintiff. The actual time spent of an attorney for plaintiff in the preparation for trial was much greater than that in the taking of testimony at South Omaha, and in the trial. A reasonable attorney's fee is not less then $600.00.

Wherefore, plaintiff and their attorneys move the court that there be taxed to the defendant as a part of the costs in this case
46 an attorney's fee in behalf of Courtright, Sidner & Lee in the sum of not less than $600.00.

Reference is had to the affidavits hereto attached marked Exhibit A and made part hereof.

NYE SCHNEIDER FOWLER CO.,
By COURTRIGHT, SIDNER & LEE,
Its Attys.
COURTRIGHT, SIDNER & LEE.

Subscribed and sworn to.

Mr. Courtright, on the stand:

I am an attorney at law in regular practice at Fremont, Nebraska, and have been for about 27 or 28 years. I have been actively engaged in the preparation of trial and the taking of testimony and all the legal work involved in this case.

The motion recites I went to South Omaha two times. I went three times, I remember now. At each time I took testimony there. The trial involved four days and took the time of Mr. Sidner, my partner, and myself. Mr. Sidner has been in the practice with me for nearly twenty years at Fremont.

I am familiar with the reasonable charges for services of this kind, and the reasonable value of the legal services rendered is at least $600.00.

I understand from Mr. Dressler that his contest in this matter is over the taxation of an attorney fee*t* at all, and that he is not questioning but what $600.00 is reasonable, if any fee at all is to be taxed.

Cross-examination.

By Mr. Dressler:

2625 Q. Do you think where a party brings suit for nearly $3,000.00, and he is defeated on all of it except approxi-
47 mately $800.00, that $600.00 is a reasonable attorney's fee, when $1,200.00 of the amount sued for the jury found to be unjustified?

A. I din't think that the value of the services are to be wholly determined by the misfortune in not recovering more.

2626 Q. Do you think, under the circumstances I have given, that $600.00 is a reasonable fee.

A. I do. And I will say that in another case on trial between the same parties I actually received from my clients, as I remember it, more than $600.00, with a recovery a good deal less than this one.

2627 Q. Well, of course, in that case you got licked and you earned it.

A. Well, I made a recovery. I was not able in that case to recover anything over the charge. I made a charge to my client greater than I am asking here and recovered a much smaller amount.

Witness excused.

Mr. Dressler: Defendant now moves the court to strike out all of the testimony of W. J. Courtright given in support of his application for the taxation of an attorney's fee as part of the costs, and the defendant objects to the introduction of any further testimony on the subject, for the following reasons:

That said Section 6063 of the Revised Statutes of the State of Nebraska, 1913, is unconstitutional and void.

1. Because said statute, if enforced, will deprive the defendant of its property without due process of law, and deny to the defendant the "equal protection of the laws", contrary to Section 1 of the 14th amendment of the Constitution of the United States.

2. That said statute, if enforced, will deprive the defendant of its property without due process of law, contrary to Section 3, Article 1, of the constitution of Nebraska.

48 3. The facts as to the basis for the allowance of an attorney's fee under said Statute, Section 6063 of the Revised Statutes of the State of Nebraska, 1913, are matters on which the defendant is entitled to a trial by jury and the same jury which tried the case, as guaranteed by Section 3, Article 1 of the constitution of the State of Nebraska.

Motion overruled. Defendant excepts.

W. G. KELLOGG, being called on part of plaintiff, sworn and examined, testified as follows:

Examined by Mr. Courtright:

2628 Q. You are the same party who was sworn in this case heretofore in the trial before the jury.

A. Yes, sir.

2629 Q. You are now claim agent for Nye Schneider Fowler Co.

A. Yes, sir.

2630 Q. How long have you held that position?

A. About a year and a half.

2631 Q. Who is your predecessor?

A. E. C. Roberts.

2632 Q. Where is he now.

A. I think he is in Saint Joseph, Missouri. I don't know. That is where he is supposed to be.

2633 Q. Your opinion is there is no one here knows where he is at the present time.

A. No.

2634 Q. It is a matter of guesswork.

A. Hearsay, yes.

2635 Q. Do you have charge of the records and books with
49 reference to the filing of claims in hog claim cases?

A. Yes, sir.

2636 Q. But you did not file all of them at the time of the shipments involved in this case.

A. I did not.

2637 Q. You are familiar with the 71 items on which this case went to trial?

A. Yes, sir.

2638 Q. You were present during the trial and know which items and which propositions are involved?

A. Yes.

2639 Q. Have you run over, checked over and looked over, the records with reference to the filing of claims in these 71 different items?

A. I have.

2640 Q. Now have you looked over and checked over the time of filing of these claims in all these cases.

A. I did.

2641 Q. Were claims filed in Items 39 and 40?

A. Yes, sir.

2642 Q. Were the claims filed within ninety days in those cases?

A. No, sir.

2643 Q. Then with reference to all the other items, were claims filed?

A. Yes, sir.

Mr. Dressler: This is objected to because calling for hearsay testimony and the conclusion of the witness, not the best evidence.

Objection overruled. Defendant excepts.

2644 Q. Were the claims filed in all these cases within ninety days from the time of shipment.

50 A. Yes, sir.

Same objection, overruled, defendant excepts.

Cross-ex. waived.

Witness excused.

E. J. SLATER, being called on the part of the plaintiff, sworn and examined, testified as follow-:

Examined by Mr. Courtright:

2645 Q. You are now the superintendent of the hog and grain department of the plaintiff, Nye Schneider Fowler Co.

A. Yes, sir.

2646 Q. How long have you held that position?

A. About nine years.

2647 Q. Your headquarters' office is at Fremont, Nebraska.

A. Yes.

2648 Q. That is the general headquarters of the plaintiff?

A. Yes, sir.

2649 Q. Is the mater of filing claims for losses in transit, or damage in transit, in both hog and grain matters, claims against the rarilroad company, is that in your department?

A. Yes, sir.

2650 Q. Do you have general, and have you had general, supervision of all that matter for several years past?

A. Yes, sir.

2651 Q. You are familiar with this case, and you know which matters are involved in this present litigation.

Objected to as leading and suggestive.

A. I think I do.

Objection overruled. Defendant excepts.

2652 Q. During the time of the shipment involved in
51 these items, did you have a claim agent acting under your supervision and direction?

A. Yes, sir.

2653 Q. Was he in charge of the details of the filing of the claims.

A. Yes.

2654 Q. But it was all under your directions?

A. Yes, sir.

2655 Q. He was Mr. Roberts.

A. Yes, sir.

2656 Q. Is he here now.

A. Not to my knowledge. He left Fremont a few months ago, quite a good many months ago.

2657 Q. More than a month ago.

A. Yes.

2658 Q. Long before the commencement of this action?
A. Yes, sir.
2659 Q. Do any of you people know where he is now.
A. I do not.
2660 Q. Do you know that anybody does.
A. No, sir, I don't; positively, I don't.
2661 Q. Now did you have an established method, practice and program for the filing of these claims.
A. Yes, sir.
2662 Q. Now in these shipments of hogs that went to South Omaha, are you familiar with the railroad accommodations or conditions, in a general way, at South Omaha, as to the hog market?
A. Yes.
2663 Q. Does this defendant railroad company have an agent stationed at South Omaha.
A. They have an agent there and a station there, yes, sir.
2664 Q. Now were these claims filed with that station agent?

52 Mr. Dressler: Defendant objects to the question as hearsay, incompetent from this witness, no foundation laid.

Objection overruled. Defendant excepts.

Mr. Dressler:

Question. You never filed any claims on any of the items in this action personally, did you?
A. No, sir.
2665 Q. You have always been located in Fremont in the office here?
A. Yes.
2666 Q. You were never located at South Omaha?
A. No, sir.

Mr. Dressler: We insist on the objection.
Court: He doesn't seem to know, according to his answer now.
Witness: He asked whether I filed them personally or not. I did not.

Mr. Courtright:

2667 —. Well, do you know, in a general way, of the filing?
A. I do.
2668 Q. Of these claims.
A. I do, sir.
2669 Q. They were filed you say under your direct supervision and control.
A. Yes, sir.
2670 Q. By an employ- acting directly under you?
A. Yes, sir.
2671 Q. Now, then, were these claims filed with the agent of the defendant at South Omaha?
A. Yes, sir.

Mr. Dressler: Objected to as incompetent from this witness, hearsay, no foundation laid.

Objection overruled. Defendant excepts.

53 2672 Q. And these shipments were all made to South Omaha?

A. Yes, sir.

2673 Q. The defendant, during all this time, has maintained an office at South Omaha?

A. Yes, sir.

2674 Q. Were each of these claims in writing?

Mr. Dressler: Objected to as hearsay, incompetent coming from this witness, no foundation laid.

Objection overruled. Defendant excepts.

A. Yes, sir, I will say they were in writing, because I have examined a good many of the claims. They have come to my office or desk. And as regards the claims being filed with the South Omaha office, I have seen many receipts that have come back from the South Omaha office acknowledged by the South Omaha agent.

Mr. Dressler: I move to strike out the voluntary answer of the witness as incompetent, hearsay, not the best evidence, and nothing to apply to any particular item in this case.

Motion overruled. Defendant excepts.

2675 Q. Did each of the claims state the nature and amount of the claim?

A. Yes, sir.

Objected to as hearsay and not the best evidence.

Objection overruled. Defendant excepts.

2676 Q. And each of the claims were accompanied either by the the bill of lading, or a duplicate bill of lading.

Defendant objects as hearsay, incompetent, and not the best evidence.

Overruled. Defendant excepts.

A. They were accompanied by the livestock contract that is issued when the shipment is made.

54 2677 Q. Is that another name for the bill of lading or duplicate bill of lading.

A. Yes. It is in lieu of the regular grain bill of lading. It is the contract. It is for stock, the same as a bill of lading would be for the shipment of grain.

2678 Q. Then, as applied to stock shipments, is it a bill of lading.

A. I should think so. That is all the receipt that is given by the company.

2679 Q. That is all that is issued for that purpose.

A. For that purpose, yes, sir.

Cross-examination.

By Mr. Dressler:

2680 Q. You say you don't know where Roberts is now.
A. I do not.
2681 Q. Have you inquired?
A. No, sir.
2682 Q. You haven't tried to find him?
A. No, sir.

Witness excused.

W. J. COURTRIGHT, recalled on part of plaintiff, testified as follows:

This case, involved the shipment, as finally submitted to the jury, of 71 cars of hogs, from stations in Nebraska to other stations in Nebraska, over the line of the defendant—Chicago & North Western Railway, and all the shipments involved, were wholly within the state. I know the defendant is a railroad and a common carrier for hire of freight.

Plaintiff rests.

55 Mr. Dressler: The defendant now objects to the allowance of any attorney's fee in this case, for the further reason that the evidence is insufficient to constitute a compliance with said pretended statute.

Objection overruled. Defendant excepts.

Plaintiff rests.

Defendant rests.

56 The following is a copy of the Deposition of L. G. Laidlaw (A. G. Liedlaw) as the same appears on pages 406, red ink figures, to 426, inclusive, of said Bill of Exceptions, being questions 1033 to 1084, inclusive, and the answers thereto:

57 Taken at South Omaha, Nebraska, December 28th, 1918.

A. G. LIEDLAW, being by me first duly examined, cautioned and solemnly sworn, testified as follows:

Examined by Mr. Courtright:

1033 Q. Mr. Liedlaw, calling your attention to general Exhibit A, is that one of the leaves out of the chute book which is used in your office? I am dealing now with whether that is the form of book that is used.
A. It is made in my office. Then it is turned over to the yardmaster and the contents of each car recorded by him.

1034 Q. Now you may explain in detail just how and by whom each one of these columns in the chute book is filled in and when?

A. The first entry in this exhibit is made by the car checker when checking the train into the chutes.

1035 Q. Right in connection with that state what he enters in which column?

A. Under the column headed car number.

1036 Q. Now go on and complete the whole thing.

A. The book is then brought to my office and the way bills for the stock is checked to the train by the car number on the way bills. A bulletin for the train is then written from the way bills. The way bills are read aloud by the party making the bulletin. The same entry under the heads of "consignor" and "consignee" is made by the car checker opposite each car number as the way bills are called by the party making the bulletin. The book is then turned over to the yardmaster and the chute number into which each car has been unloaded is recorded under the column marked "chutes." The chute gates are then unlocked by one of the men in charge of yarding under the direction of the yardmaster. The stock is then driven from the chutes and counted by him and the count from each car entered under the columns headed "Cattle, Hogs, Sheep,
58 Horses and Mules," whatever the contents of the car may be as to these classified heads. After the stock has been counted, it is given to one of the stockyards employees whose name is recorded under the column, or I should say in the column, headed, "Yarding in charge of." The stock is taken by him to the pens allotted to the commission firm entered in the column "Consignee." Frequently, the stock is delivered to one of the employees of the commission firm or consignee at their pens. The time of this delivery is noted under the heading of the column "Pens." Should the stock not be delivered, or I might say received, by one of the employees of the consignee, the stock is yarded in and locked up in one of the pens of the stockyards company. The number of the block and pen is then reported back to the yardmaster at the chutes by the party who was in charge of the yarding and the block and pen recorded under the heading, I should say in the columns, under the heading "Block and Pen." When the train has been unloaded, the yardman in charge of the dead stock reports his deads to the yardmaster, giving the car number and the chute from which the dead stock was taken, and this is entered in the column under the head "Deads." The cripple checker, as the stock is being driven from the chutes, makes a record of the crippled stock and reports the same to the yardmaster, giving the chute number in which the crippled animals or animals has been found or rather are found. This record is entered in the column under the heading "Crips." The cripples are then tagged and given a number in order to identify them with the car to which they belong under any circumstances.

1037 Q. That covers it?

A. Under the column headed "Scabby" and marked with a cross, the entry in this column is made at the direction of the Government Inspectors of the B. A. I., (Bureau of Animal Industry). Cattle or

Time Set_____ Time Unloaded____

200 Books 8-5-18-M.C.

Consignor.	Consignee.	Yarding i
General Exhibit A.		

_____

_____191__.

_____R. R.

Charge of		Car No.	Chute.	Block.	Pen.	Cattle.	Hogs.	Sheep.	H. & M.	Cripe.	Dead.	TIME DELIVERED. Chutes	Alleys	Pens.	SCABBY - X. CLEAN —.

59a

sheep found to be infected with scabbies are marked with a cross in this column. When cattle are clean, a dash in this column is made. I think that covers it.

59 Mr. Courtright: We now, for the purpose of laying the foundation for the introduction in evidence of the yard record book, offer in evidence General Exhibit A.

(Here follows reproduction of General Exhibit A, marked page 59*a*.)

1038 Q. Now, Mr. Liedlaw, you may examine exhibit B and state if that is one of the printed pages out of the dead stock record which is kept by the Union Stockyards Company?

A. One page is a dead record or rather a record of dead stock only. The right hand page.

1039 Q. You may now state in detail how this record shown by exhibit B is kept and made up as to both pages thereon.

A. On the line headed "Date and year," the date of the day is entered.

1040 Q. It will be the date of the arrival of the stock?

A. Yes, that is the idea. Under the column headed "R. R.," the railroad from which the stock has been delivered is noted. The car number opposite the first chute is then entered under the column headed "1st car number." Under the column headed "Time
60 set," the time the train was set to the chutes is entered. In the next column headed "Time out," the time is entered when the unloading of the train was completed. Under the column headed "Number of cars," the number of the cars in this particular train is entered. Under the column on the right hand page headed "Car number" is entered the number of the car from which any dead animal has been taken. The chute number at which this car was unloaded is then entered under the head "Chute." Should the dead animal be cattle, hogs, sheep or horse or mule, the entry is made in the column which classifies the various kinds of stock. Under the column headed "R. R." on the right hand page of this record, the dead hog checker enters the name of the railroad from whom this car or cars have been received. He then reports his deads to the yardmaster and receives from him the name of the commission firm or consignee to whom the car containing the dead stock was consigned. Entry of the name of this firm is made in the column on the left hand, headed "Commission firm." Frequently, in loading stock, shippers have hogs that are slow or crippled. These hogs are frequently partitioned off in the corner or end of the car. When any of these hogs are found in a car, a notation is made of the car number and this is entered under the column headed "Boxed hogs." These dead animals are then weighed under the supervision of the dead hog packers whose duty it is to weigh these dead hogs. The weight or price is then entered in the column headed "Weight or price."

1041 Q. Now, in making up this record, general exhibit B, as to any one completed item, how many different men may make entries upon that book?

A. One man.

1042 Q. And does this record show who that man was?

A. No.

1043 Q. Is there any way to tell who it was, except by identifying the handwriting.

61 A. He can be identified always by his handwriting.

1044 Q. Is that the only way?

A. He would be carried on our Pay-roll as the dead hog checker at one of the sets of chutes where the stock is unloaded and could also be identified from that record.

TRAIN RECORD.

Date_____ 19___

Form 44, 50 Books, 11-2-16 R.P.Co.

R.R.	1st Car No.	Time Set	Time Out	No. Cars	Commission
	General Exhibit D.				

DEAD STOCK RECORD.

Firm	R.R.	Car No.	Chute.	Block.	Pen.	Cattle.	Hogs.	Sheep.	H. & M.	Boxed Hogs.	Price or Weight.
											6/a

1045 Q. How many dead hog checkers do you have in the employ of the stockyards company at one time?
A. Four.

Mr. Courtright: For the purpose of laying the foundation for the introduction in evidence of another book, we now offer in evidence General Exhibit B.

(Here follows reproduction of General Exhibit B, marked page 61*a*.)

1046 Q. Now, Mr. Liedlaw, you may examine General Exhibit C and state if that is a leaf out of the cripple record kept by Union Stockyards Company?

A. Yes.

1047 Q. You may state in detail how this record is kept by the employees of the Stockyards Company.

A. This record is kept by the employee of the Stockyards Company whose duty it is to keep a record of the crippled stock
62 unloaded from each car. The date of the arrival of the stock is entered on the line noted for that purpose. It is the duty of the cripple checker to drive from the chutes all of the stock after it is delivered to the commission firms or yarded out in the pens of the Union Stockyards Company. Under the column headed "Chute," the number of cripples is entered which have been taken from any one particular car. This cripple is then marked by a tag fastened in the car bearing a number that will identify the animal under any conditions. He then reports the number of cripples taken from the train that has just been yarded and ascertains from him the consignee of any car containing crippled stock. Also the name of the railroad from which this stock or train of stock has been received. This is entered in the column headed "R. R." Should it be necessary to remove the cripple or cripples from the chute into which the car containing this stock was unloaded, entry is made under the column headed "Block and pen," giving the number of the block and the pen to which the cripple or cripples have been transferred. I believe that is all.

1048 Q. As to any one completed item appearing on Exhibit C, how many different men make the entries?

A. One man.

1049 Q. And what do you call that man?

A. The Cripple checker.

1050 Q. And how many cripple checkers are in the employ of the Stockyards Company at one time?

A. Four.

1051 Q. Does the name of the man making an entry as to one completed item appearing on this book, appear on this book with reference thereto?

A. Sometimes the men in charge of those books write their names in the book. From this, the cripple checker who made the entry might be identified.

Mr. Courtright: For the purpose of laying the foundation
63 for the introduction in evidence of another book, we now offer in evidence General Exhibit C.

(Here follows reproduction of General Exhibit C, marked page 63*a*.)

Form 90-50 books-9-1-16-C. & M.

UNION STOCK YARDS CO. OF OMAHA

Date_____ 19___

Consignor.	Consignee.	R.R. Tag No.	Chute
General	Exhibit	C.	

A (LIMITED).

CRIPPLE RECORD

e.	Block	Pen	Cattle	Hogs.	Sheep	H. & M.
					63a	

Cross-examination.

By Mr. Dressler:

1052 Q. Mr. Liedlaw, you referred to the dead hog checker tagging a hog in the chute which had come from a particular car. As a matter of fact, the dead hog checker doesn't know the number, that is the car number, of any car out of which a particular crippled hog may have come, does he?

A. Do you refer to dead hogs or cripples?

1053 Q. Cripples.

A. And you mention the dead hog checker?

1054 Q. Make it cripple hog checker.

A. No, he doesn't know the car number.

1055 Q. He has to depend upon the yardmaster's book for the car number?

A. Yes.

1056 Q. And as to the train out of which the crippled animals may have come, the cripple checker has no knowledge but
64 his information is confined to the chute number in which he finds a particular cripple?

A. Yes.

Redirect examination.

By Mr. Courtright:

1057 Q. As to General Exhibit A as to any particular completed transaction involved in those records, how many different men would make the entries composing a completed entry?

A. Two.

1058 Q. And who would they be?

A. The car checker and the yardmaster.

1059 Q. And how many car checkers do the Stockyards Company have at one time in its employ?

A. Three.

1060 Q. And how many yardmasters are in its employ at one time?

A. Nine.

1061 Q. Does this record Exhibit A, show the name of the car checker making the entries?

A. No.

1062 Q. Does it show the name of the yardmaster making the entries?

A. No.

1063 Q. You may explain then what name is entered in the column "Yarding in charge of?"

A. The employee of the stockyards company who has charge of a load of stock taken from the chutes is entered by the yardmaster in the column under the heading, "Yarding in charge of."

1064 Q. Then how many different men does the stockyards com-

pany have in its employ at one time who have charge of the yarding of stock and whose names would appear in this column headed "Yarding in charge of" on General Exhibit A?

A. I could give a number about but not a correct statement.

1065 Q. State it approximately.

A. Two hundred.

65 Recross-examination.

By Mr. Dressler:

1066 Q. But there would only be one such name, that is "Yarding in charge of" for each car?

A. Yes, unless it was a mixed car of stock.

1067 Q. And if it were mixed with cattle and hogs, there might be one employee in charge of each class.

A. Yes.

1068 Q. But there would only be one such name or one such employee where it was a straight car load?

A. Yes.

Redirect examination.

By Mr. Courtright:

1069 Q. Now, Mr. Liedlaw, do you have before you a set of books kept by the Union Stockyards Company known as the "Yard Record," and which records entries of stock coming in over the Chicago and North Western Railway Company's lines?

A. Yes.

1070 Q. Does General Exhibit D show the printed page form of this record?

A. Yes.

1071 Q. Is this record known as General Exhibit D, the record that is compiled from the records marked General Exhibit A, B, and C?

A. A part of it only.

1072 Q. From what source is the other portion compiled?

A. From the way bill.

1073 Q. And are these records, of which General Exhibit D are the printed forms, compiled in part by you as an employee of Union Stockyards Company in charge of these records and in part by the employees of Union Stockyards Company working under your supervision and direction? By this question, I refer only to the set of books of which General Exhibit D is a printed form and not to the books of which General Exhibits A, B, and C are printed forms.

66 A. Yes.

1074 Q. You may state whether or not the entries in these various books before you, of which General Exhibit D is a printed form, constitute a correct entry of the information entered therein.

UNION STOCK

Time Set.	Chute Book No.	Chutes	Road.	Road.	No. Car.	Chute.

General Exhibit D.

Hogs.	Sheep.	H.&M.	Cripe.	Dead.	Consignor.		Residence.	State.	C

YARD RECORD BOOK.

ence.	State.	Consignee.	Destination	Remarks.

General Exhibit D.

67a

Mr. Dressler: Objected to as calling for an opinion and conclusion of the witness, and hearsay, incompetent and not the best evidence.

A. Yes.

1075 Q. These books that you have before you are designated by you in your records as "Yard record," are they?

A. Yes.

1076 Q. Does this yard book, under the column headed "Road," have entered in it in all cases an entry indicating that it refers to the Chicago and North Western?

A. Yes.

Mr. Courtright: We now offer in evidence the various entries in the yard record just mentioned by the witness, the same being entered on the printed forms shown by General Exhibit D, so far as these records relate to the transactions and car numbers mentioned in plaintiff's petition, and read into the record these various entries other than the entry under the column headed "Road," this being unnecessary for the reason that the entire record relates to the Chicago and North Western road.

67 (Here follows reproduction of General Exhibit D, marked page 67*a*.)

Mr. Dressler: The defendant desires to cross-examine before objecting to the offer.

Recross-examination.

By Mr. Dressler:

1077 Q. Mr. Liedlaw, this bunch of records that Mr. Courtright is talking about now, of which General Exhibit D is the printed form, are the ledgers or records of that nature which is merely bookkeeping taken from the dead stock record, the cripple record and the chute record and the way bills?

A. Yes.

1078 Q. When you said that these stockyard records, of which exhibit D is the printed form, contained correct entries taken from the cripple record, the dead stock record, the chute record and the way bills, you mean simply that the bookkeeping is correct to the best of your knowledge and belief?

A. I do.

1079 Q. And that is all you mean?

A. Yes.

1080 Q. And as you testified the other day, the dead stock
68 record made up by the dead stock checker, the cripple record made up by the cripple checker, and the chute book made up by the car checker and the yardmaster, all of those books are still in the custody of the Stockyards Company, are they not?

A. Yes.

1081 Q. And available?

A. Yes.

1082 Q. And those records that I have mentioned, the dead stock record, the cripple record, and the chute book, are the original entries for the information recorded on those books, are they not?

A. Yes.

1083 Q. And this record that Mr. Courtright has offered in evidence, of which General Exhibit D is the printed form, is not the original entry but is merely bookkeeping from those other original records. Is that true?

A. Yes.

Mr. Dressler: Defendant objects to the offer as incompetent and hearsay and not the best evidence and an attempt to deprive the court and jury of the benefit of the original records, and said records constitute a mere conclusion of bookkeeping and are incompetent for our purposes.

Mr. Courtright: In dictating this record, I will preface each entry with the corresponding item number appearing in plaintiff's petition.

Mr. Dressler: It is understood that the foregoing objection applies to each item or cause of action concerning which Mr. Courtright expects to read from the record.

Mr. Courtright: Plaintiff's attorney states that there is no
69 column in this book for the date but the date appears at the top of the page and will be read as an item in each case immediately following the petition item number.

Read by Mr. Courtright.

Testimony of Mr. Courtright.

Item No.	Date.	Time set.	Chute book No.	Chutes.	Car No.	Chute.	Cattle.	Hgs.	Crips.	Dds.
	Consignor.			Residence.					Consignee.	
93,	1-19-16,	3:16a.	8,	East,	3599,	9.	2 Calves 3,	60,	2,	
Nye Schneider Fowler Co.,				Swedeburg.					Standard Livestock.	
104,	1-25-16,	8:09a.	21,	East,	17663,	16.		73,	2,	
Nye Schneider Fowler Co.,				Surprise,					Standard Livestock.	
77,	1-25-16,	8:40a.	24,	East,	34461,	27,		57,		
Nye Schneider Fowler Co.,				Leigh,					Standard Livestock.	
15,	2-2-16,	9:20a.	23,	East,	21367,	23,		77,	1,	2,
Nye Schneider Fowler Co.,				Clear Water.					Standard Livestock.	
60,	2-2-16,	10:45a.	29,	East,	21571,	2,		64,	1,	5,
Nye Schneider Fowler Co.,				Anoka,					Standard Livestock.	
23,	2-3-16,	8:58a.	25,	North,	21879,	34,		78,	2,	1,
Nye Schneider Fowler Co.,				O'Neill,					Standard Livestock.	
24,	2-8-16	9:17a.	29,	North,	20951,	54,		86,	1,	2,
Nye Schneider Fowler Co.,				O'Neill.					Standard Livestock.	
2,	2-9-16,	7:55a.	24,	North,	90385,	43,		74,	1,	
Nye Schneider Fowler Co.,				Wisner.					Standard Livestock.	
21										
8,	2-20-16,	8:45a.	38,	East,	89889,	34,		72,		2,
Nye Schneider Fowler Co.,				Oakdale.			1 sheep		Standard Livestock.	
61,	3-1-16,	8:25a.	30,	East,	16843,	14,		94,	1,	
Nye Schneider Fowler Co.,				Anoka,					Standard Livestock.	
49,	3-9-16,	7:25a.	22,	South,	88911,	78,		70,	2,	2,
Nye Schneider Fowler Co.,				Rushville.					Standard Livestock.	

Item No.	Date.	Time set.	Chute book No.	Chutes.	Car No.	Chute.	Cattle.	Hgs.	Crips.	Dds
	Consignor.			Residence.					Consignee.	
62.	3-11-16,	7:20a.	13,	South,	90591,	6,		78,	1,	
Nye Schneider Fowler Co.,				Anoka,					Standard Livestock.	
105,	3-16-16,	8:25a.	29,	North,	88417,	1,		58,	1,	
Nye Schneider Fowler Co.,				Surprise,					Standard Livestock.	
32,	3-17-16,	6:44a.	15,	South,	88811,	14,		53,	4,	
Nye Schneider Fowler Co.,				Emmett.					Standard Livestock.	
70										
53,	3-21-16,	7:20a.	24,	North	39771,	51,		72,	1,	
Nye Schneider Fowler Co.,				Bristow,					Standard Livestock.	
78,	3-29-16,	2:37a.	27,	North,	90231,	18,	1,	73,	1H.	
Nye Schneider Fowler Co.,				Leigh,					Standard Livestock.	
63,	4-18-16,	6:57a.	13,	East,	17773,	32,		80,	1,	
Nye Schneider Fowler Co.,				Anoka,					Standard Livestock.	
33,	9-10-16,	7:22a.	26,	East,	3863,	10,		81,	1,	
Nye Schneider Fowler Co.,				Emmett,					Standard Livestock.	
96,	4-15-16,	6:00a.	11,	North,	89821,	36,		81,		
Nye Schneider Fowler Co.,				Davey,					Standard Livestock.	
3,	4-15-16,	7:15a.	15,	South,	4325,	81,		55,	1,	
Nye Schneider Fowler Co.,				Wisner,					Standard Livestock.	
89,	5-2-16,	5:30a.	16,	East,	4599,	30,	1,	55,	2 Calves,	
Nye Schneider Fowler Co.,				Swedeburg,					Standard Livestock.	
83,	5-10-16,	4:04a.	8,	North,	20111,	12,		88,	1,	
Nye Schneider Fowler Co.,				Newman's Grove,					Standard Livestock.	
34,	5-12-16,	5:43a.	9,	North,	89377,	1,		58,	1,	
Nye Schneider Fowler Co.,				Emmett,					Standard Livestock.	
16,	5-26-16,	6:35a.	14,	East,	17733,	18,		74,	1,	

Nye Schneider Fowler Co.,
39, 5-27-16, 5:50a. 40, Clearwater, South, 88939. 14, 28 & 26, 53, Standard Livestock. 41 & 2, 83 Pens
Nye Schneider Fowler Co.,
84, 6-1-16, 5:30a. 16, Rushville, East, 21205. 31, 69, Standard Livestock. 3,
Nye Schneider Fowler Co.,
25, 6-1-16, 8:30a. 26, Newman's Grove, North, 7989. 36, 89, Standard Livestock. 1,
Nye Schneider Fowler Co.,
9, 6-10-16, 6:07a. 10, O'Neill, North, 21027. 6, 64, Standard Livestock. 1,
Nye Schneider Fowler Co.,
98, 6-13-16, 6:55a. 19, Oakdale, East, 30111. 29, 10, 36, Standard Livestock. 1 Calf, 1,
Nye Schneider Fowler Co.,
71 Brainard,

99, 6-14-16, 7:04a. 21, South, 25111. 3, 2, 67, Standard Livestock. 1,
Nye Schneider Fowler Co.,
17, 6-16-16, 6:35a. 16, Brainard, East, 88607. 17, 76, Standard Livestock. 2,
Nye Schneider Fowler Co ,
90, 6-17-16, 4:58a. 5, Clearwater, East, 89523. 3, 59, Standard Livestock. 1,
Nye Schneider Fowler Co.,
12, 6-23-16, 7:13a. 15, Swedeburg, East, 17573. 3, 71, Standard Livestock. 1,
Nye Schneider Fowler Co.,
26 Oakdale,

40, 6-25-16, 1:20a. 18, East, 16983. 13, 91, Standard Livestock. 1,
Nye Schneider Fowler Co.,
3 Johnstown,

10, 7-2-16, 7:15a. 27, East, 90155. 21, 1, 55, Standard Livestock. 1, 1,
Nye Schneider Fowler Co.,
5 Oakdale,

26, 7-4-16, 7:03a. 31, South, 90369. 15, 88, 1,

Item No.	Date.	Time set.	Chute book No.	Chutes.	Car No.	Chute.	Cattle.	Hgs.	Crips.	Dds.
	Consignor.			Residence.					Consignee.	
	Nye Schneider Fowler Co.,			O'Neill,					Standard	Livestock.
100,	7-6-16,	6:35a.	18,	North,	17045,	16,		45,	1,	1,
	Nye Schneider Fowler Co.,			Brainard,					Standard	Livestock.
54,	7-8-16,	7:04a.	18,	South,	21827,	10,		61,	1,	1,
	Nye Schneider Fowler Co.,			Bristow,					Standard	Livestock.
64,	7-20-16,	5:50a.	15,	South,	88943,	72,		61,		1,
	Nye Schneider Fowler Co.,			Anoka,					Standard	Livestock.
85,	7-26-16,	6:22a.	13,	North,	89299,	17,		55,	1,	
	Nye Schneider Fowler Co.,			Newman's Grove,					Standard	Livestock.
91,	7-26-16,	6:22a.	13,	North,	4801,	20,	3,	46,	1H.	2H.
	Nye Schneider Fowler Co.,			Swedeburg,					Standard	Livestock.
18,	7-28-16,	6:40a.	15,	South,	38039,	10,		73,	1,	
	Nye Schneider Fowler Co.,			Clearwater,					Standard	Livestock.
	31									
41,	7-30-16,	8:15p.	11,	North,	21019,	5,		67,		3,
	Nye Schneider Fowler Co.,			Johnstown,					Standard	Livestock.
65,	8-2-16,	8:26a.	23,	South,	37882,	87,		63,		
	Nye Schneider Fowler Co.,			Anoka,					Standard	Livestock.
72										
19,	8-5-16,	6:30a.	8,	East,	39751,	4,		73,	2,	
	Nye Schneider Fowler Co.,			Clearwater,					Standard	Livestock.
42,	8-18-16,	7:22a.	15,	East,	16985,	28,		76,		5,
	Nye Schneider Fowler Co.,			Johnstown,					Standard	Livestock.
82,	9-2-16,	9:58a.	21,	South,	90183,	13,	1 Calf, 1,	71,		

Nye Schneider Fowler Co.,				Cornlea,				Standard Livestock.	
4									
35,	9-3-16,	11:45a.	3,	South,	58897.	70,	54,	1,	
Nye Schneider Fowler Co.,				Emmett,				Standard Livestock.	
92,	9-15-16,	6:27a.	11,	East,	17473.	28,	52,	1,	
Nye Schneider Fowler Co.,				Swedeburg,				Standard Livestock.	
20,	9-20-16,	7:35a.	23,	North,	90541.	22,	76,	1,	
Nye Schneider Fowler Co.,				Clearwater,				Standard Livestock.	
27,	9-22-16,	6:55a.	13,	South,	86741.	36,	87,		
Nye Schneider Fowler Co.,				O'Neill,				Standard Livestock.	
28,	10-11-16,	8:53a.	28,	North,	3747.	8,	8, 81,	1H.	
Nye Schneider Fowler Co.,				O'Neill,				Standard Livestock.	
30									
66,	10-29-16,	8:20a.	41,	North,	89333.	51,	73,	1,	
Nye Schneider Fowler Co.,				Anoka,				Standard Livestock.	
103,	11-14-16,	9:55a.	30,	North,	19795.	43,	56,	1,	
Nye Schneider Fowler Co.,				Geohner,				Standard Livestock.	
44,	12-9-16,	7:59a.	14,	North,	21383.	16,	74H,	3 sheep,	
G. Kline,				Johnstown,				Standard Livestock.	
18									
29,	12-17-16,	6:30a.	39,	South,	500411.	96,	89,	1,	1,
Nye Schneider Fowler Co.,				O'Neill,				Standard Livestock.	
69,	12-23-16,	7:13a.	14,	North,	17599.	9,	70,	1,	
Nye Schneider Fowler Co.,				Howells,				Standard Livestock.	
70,	12-28-16,	7:22a.	17,	East,	89419.	12,	88,	1,	1,
Nye Schneider Fowler Co.,				Howells,				Standard Livestock.	
73									
71,	12-30-16,	8:08a.	15,	South,	89389.	14,	83,	1,	

Item No.	Date.	Time set.	Chute book No.	Chutes.	Car No.	Chute.	Cattle.	Hgs.	Crips.	Dds.
Consignor.				Residence.					Consignee.	
Nye Schneider Fowler Co.,				Howells,					Standard Livestock	
68,	1-5-17,	8:00a.	21,	North,	4859,	45,		88,	2,	
Nye Schneider Fowler Co.,				Anoka,					Standard Livestock.	
72,	1-10-17,	6:15a.	12,	South,	89003,	75,		61,	1,	
Nye Schneider Fowler Co.,				Howells,					Standard Livestock.	
51,	1-10-17,	10:26a.	32,	North,	39079,	33,		89,	2,	2,
Nye Schneider Fowler Co.,				Rushville,					Standard Livestock.	
101,	1-11-17,	7:54a.	16,	North,	88519,	17,		64,	2,	
Nye Schneider Fowler Co.,				Brainard,					Standard Livestock.	
11,	1-11-17,	10:30a.	28,	East,	19101,	12,		81,	1,	
Nye Schneider Fowler Co.,				Oakdale,					Standard Livestock.	
43,	1-11-17,	11:30a.	31,	North,	88903,	43,	1,	81,	2,	4,
Nye Schneider Fowler Co.,				Johnstown,					Standard Livestock.	
87,	1-13-17,	7:14a.	13,	North,	4861,	16,		71,	2,	
Nye Schneider Fowler Co.,				Colon,					Standard Livestock.	
6,	1-16-17,	10:45a.	35,	East,	89899,	25,		68,		1,
Nye Schneider Fowler Co.,				Stanton,					Standard Livestock.	
							4 Calves.			
94,	1-23-17,	4:56a.	9,	East,	19579,	10,	8 Cattle,	46,	1,	
Nye Schneider Fowler Co.,				Swedeburg,					Standard Livestock.	
55,	2-1-17,	8:33a.	16,	East,	20361,	5,		1,		4,
Nye Schneider Fowler Co.,				Bristow,				79,	Standard Livestock.	
73,	2-8-17,	11:34a.	35,	North,	25031,	8,		77,		
Nye Schneider Fowler Co.,				Howels,	20741,	9,		84,	1,	
									Standard Livestock.	
80,	2-20-17,	7:20a.	15,	North,	17977,	13		58,	2,	

Nye Schneider Fowler Co.,
26
1, 2-25-17, 6:54a. 28, North, 7705, 16, 64, 1,
Nye Schneider Fowler Co., Nickerson, Standard Livestock.
74
26
56, 2-25-17, 6:43a. 29, South, 89823, 17, 74, 1,
Nye Schneider Fowler Co., Bristow, Standard Livestock.
12
86, 3-11-17, 8:38a. 42, North, 19185, 46, 65, 1,
Nye Schneider Fowler Co., Newman's Grove, Standard Livestock.
81, 3-17-17, 8:50a. 11, North, 9459, 2, 57, 1,
Nye Schneider Fowler Co., Creston, Standard Livestock.
19
45, 3-18-17, 7:38a. 14, North, 19865, 2, 1, 67, 3,
Nye Schneider Fowler Co., Johnstown, Standard Livestock.
97, 3-27-17, 7:55a. 23, East, 20029, 20, 57, 2,
Nye Schneider Fowler Co., Davey, Standard Livestock.
67, 4-1-17, 2:40a. 20, North, 38048, 45, 80, 2,
Nye Schneider Fowler Co., Anoka, Standard Livestock.
79, 4-18-17, 9:45a. 34, North, 7707, 15, 48/36, 1,
Nye Schneider Fowler Co., Leigh, Standard Livestock.
46, 4-20-17, 8:10a. 15, East, 89223, 27/7, 31/58 Part. 3,
H. Luehrs, Johnstown, Standard Livestock.
36, 4-21-17, 7:28a. 11, East, 16237, 26, 71, 2,
Nye Schneider Fowler Co., Emmett, Standard Livestock.
30, 4-26-17, 7:42a. 23, East, 19821, 5/25, 38/66, Part. 2,
Nye Schneider Fowler Co., O'Neill, Standard Livestock.

Mr. Dressler: Defendant calls attention to the fact that beginning with item #21 in this compilation, a different form of yard record book is used than the form shown by General Exhibit D.

Mr. Courtright: We offer in evidence now some pages of
75 this form book designated as General Exhibit E.

Any further dictation and entries in this yard book will be dictated as of this form.

(Here follows reproduction of General Exhibit E, marked page 75a.)

Mr. Dressler: Defendant also calls attention to the fact that commencing with exhibit #21, the yard record book is kept in lead pencil and not in ink.

Form 349 10M Sets 5-18-18.

YARD RECORD BOOK.

R.R.	Chute Book Number.	CHUTES.	Time Set.	CONSIGNOR.

General Exhibit E.

ination	Car Number.	Stock	Chute	Block	Pen	Cattle	Hogs	Sheep	H. & M	Cripe	Dead	Station

E.

p.	H. & M	Crips	Dead	Station	State	Remarks

75a

Item No.	Date.	Chute book No.		Chutes.		Time set.		Consignor.	
Consignee.		Car No.	Chute.	Cattle.	Hgs.		Trips.	Dds.	Station.
21,	5-9-17,	15,		North,		6:15a.			Nye Schneider Fowler Co.,
Standard Livestock.		17773,	35,		84,			3,	Clearwater.
47,	5-17-17,	19,		North,		7:55a.			Nye Schneider Fowler Co.,
Standard Livestock.		21823,	23,		74,		1,		Johnstown.
37,	6-2-17,	8,		North,		6:25a.			Nye Schneider Fowler Co.,
Standard Livestock.		4749,	6,		82,		1,		Emmett.
52,	6-11-17,	22,		East,		6:25a.			Nye Schneider Fowler Co.,
Standard Livestock.		3599,	10,		84,				Rushville.
76									
31,	6-13-17,	17,		South.		6:58a.			
Standard Livestock,		7735,	77,		79,		2,		Nye Schneider Fowler Co.,
4,	6-15-17,	6,		East,		5:45a.			O'Neill.
Standard Livestock,		39659,	31,		57,		1,		Nye Schneider Fowler Co.,
102,	6-16-17,	14,		North,		8.32a.			Wisner.
Standard Livestock,		7951,	23,	6.	29,				Nye Schneider Fowler Co.,
95,	6-22-17,	15,		East,		7:05a.			Goehner.
Standard Livestock,		87267,	15,		57,				Nye Schneider Fowler Co.,
13,	6-29-17.	18,		East,		8:15a.		1,	Swedeburg.
Standard Livestock,		17169,	23,	2.	1/56,		1,		Nye Schneider Fowler Co.,
16									Oakdale.
57,	7-15-17.	14,		East,		8:50a.			
Standard Livestock,		86895,	9,		69,				Nye Schneider Fowler Co.,
74,	7-16-17,	10,		North,		5:38a.			Bristow.
Standard Livestock,		17487,	1,		73,			1,	Nye Schneider Fowler Co.,
									Howells.

Item No.	Date.	Chute book No.		Chutes.		Time set.		Consignor.	
Consignee.		Car No.	Chute.	Cattle.	Hgs.		Crips.	Dds.	Station.
75,	7-25-17,	11,		East,		5:55a.		Nye Schneider Fowler Co.,	
Standard Livestock,		17793,	32,		60,			1,	Howells,
48,	7-30-17,	24,		North,		2:42a.		Nye Schneider Fowler Co.,	
Standard Livestock,		20071,	5,		74,			2,	Johnstown.
38,	7-31-17,	25,		East,		7:45a.		Nye Schneider Fowler Co.,	
Standard Livestock,		3481,	29,		69,		1,		Emmett.
58,	8-2-17,	15,		South,		6:48a.		Nye Schneider Fowler Co.,	
Standard Livestock,		90207,	6,		72,			1,	Spencer.
88,	10-10-17,	9,		East,		5:30a.		Nye Schneider Fowler Co.,	
Standard Livestock,		89915,	20,		39,		2,		Colon.
22,	12-14-17,	21,		East,		11:55a.		Nye Schneider Fowler Co.,	
Standard Livestock,		89291,	6,		63,		1,		Clearwater.
7,	1-22-18,	14,		East,		6:27a.		Nye Schneider Fowler Co.,	
Standard Livestock,		19235,	13,		74,		1,		Stanton.
5,	1-23-18,	9,		South,		4:25a.		Nye Schneider Fowler Co.	
Standard Livestock,		39661,	88,		62,			1,	Beemer.
77									
14,	2-9-18,	9,		South,		8:35a.		Nye Schneider Fowler	
Standard Livestock,		11759,	42,		50,			1,	Oakdale.
76,	2-11-18,	24,		East,		7:40a.		Nye Schneider Fowler Co.,	
Standard Livestock,		89673,	4,		66,		1,		Howells.
59,	3-4-18,	47,		North,		11:20a.		Nye Schneider Co.,	
Standard Livestock,		61653,	6,		78,		1,		Spencer.

1084 Q. Mr. Liedlaw, are these latter books from which you have heard me dictating, and copies of which appear in the record as Exhibit E, the later form of records which supplement the records shown as Exhibit D?

A. Yes.

Witness excused.

78 The following is a copy of the Deposition of J. S. Walters as the same appears on pages 431, red ink figures, to 467, inclusive, of said Bill of Exceptions, being questions 1798 to 2069, inclusive, and the answers thereto:

79 Taken at South Omaha, Nebraska, September 14th, 1917.

J. S. WALTERS, being by me first duly examined, cautioned and solemnly sworn, testified as follows:

Examination.

By Mr. Courtright:

1798 Q. Mr. Walters you live here in South Omaha?

A. Yes sir.

1799 Q. And for how many years?

A. Thirty years.

1800 Q. What is your occupation?

A. Superintendent of the Union Stockyards Company.

1801 Q. How long have you held that position? About? Just approximately?

A. Seven years I think. I don't remember just how long.

1802 Q. As superintendent you are in charge of all of the details of the management of the business, are you?

A. Yes sir.

1803 Q. How many different employes do you have under your control in the management of the business, speaking approximately?

A. I think 317 at present.

1804 Q. About what is the average number of employes?

A. I think it will average right at 300.

1805 Q. What is the nature of the business that this Stockyards Company is engaged in?

A. Handling livestock that is shipped to the yards, unloading it, feeding it, watering it.

1806 Q. Is this Stockyards Company business the receiving and handling and unloading business for all the livestock business that comes into South Omaha?

A. Yes sir.

80 1807 Q. It owns the yards and the plant and the buildings where the different commission houses are located?

A. Yes sir.

1808 Q. And the different commission houses are tenants of this company?

A. Yes sir.

1809 Q. Do you,—does such company also own and operate railroad terminal yards and tracks?

A. Yes sir.

1810 Q. About how many miles of railroad trackage is owned, speaking approximately?

A. Around forty miles, thirty-five or forty miles of railroad.

1811 Q. Now, when hogs are shipped to the South Omaha market over the Chicago & Northwestern lines, tell us in what way they are delivered at the market and if they go part way over the railroad lines of your Company, say how far and tell us about that.

A. They are delivered to the Transfer Company by the Northwestern Railroad, to the yard company on that transfer and then from that transfer they take them to the yards by the Stockyards Company engines.

1812 Q. What is the distance from this Transfer to the Stockyards Company unloading yards?

A. It varies. The North chutes and East chutes are much closer than the South chutes.

1813 Q. Tell us about it.

A. I should say that 500 feet would cover to the North and East chutes and 1,000 feet would cover to the South chutes.

1814 Q. Then, when a car of hogs is transported by the Stockyards Company over this 500 or 1,000 feet, whichever it may be to the unloading yards, what is the system of management and business by which those hogs are actually transferred to and

81 *and* delivered to the consignee.

A. They are taken to the chutes and unloaded.

1815 Q. By whom?

A. By the Union Stockyards Company employes. Sometimes they are delivered at the chutes or the pen and are unloaded for the consignee. If none of the consignees are present to take them from the chutes the Yard Company takes them and yards them for the consignee and then they are delivered in the pen from the chute.

1816 Q. Now, the cars involved in this case were all shipped to the Standard Livestock Commission Company. Does this Company have certain designated chutes or pens or do they vary?

A. They don't any of them have any assignments in hog pens. Not in advance.

1817 Q. Then when a car comes in it is unloaded in a chute and put into a pen entirely at the convenience of the Stockyards Company at that time and wholly without reference to who the consignee is?

A. Yes, we yard them; we don't care to whom consigned.

1818 Q. Now, is any count made of the number of hogs in each car?

A. Yes sir.

1819 Q. Who makes the count and when?

A. The yardmaster that yards them, he counts the hogs out of the chute and makes a record of the count.

1820 Q. At what time does this yardman make the count?

A. When he counts them out of the chute to go to the pens.

1821 Q. How long is that after unloading into the chute?

A. Just a question of how soon we can get to them. It may be immediately when first unloaded and it may be fifteen or twenty minutes or half an hour before we get to them.

82 1822 Q. Well then, a carload is unloaded into one chute by itself?

A. Yes sir.

1823 Q. And kept separate from all other hogs as they would be if left in the car?

A. Oh yes.

Mr. Dressler: Objected to as calling for a conclusion.

1824 Q. How many of these superintendents or yardmen do you have on the general average?

A. I have two yardmasters at each chute.

1825 Q. How many would that be all told?

A. There is,—I have got ten yardmasters.

1826 Q. Is the count made by the yardmaster himself?

A. Yes sir.

1827 Q. You speak of his making a record of that. What kind of a record does he make and when does he make it.

A. He is furnished with a book showing consignee, consignor and car number and he takes the car number and checks the chute number when the car is unloaded. As soon as that car is counted out he puts the count on the book. If the consignee is there to receive the stuff he simply shows delivery of the stuff and the time when delivered.

1828 Q. Now, as to the ability of the man making the count to count with accuracy, tell us how that is arranged and in what way the man makes the count.

A. I don't just understand the question.

1829 Q. Describe the conditions so the jury can tell whether the man's count is accurate.

A. The chute is—do you want the size of the chutes?

1830 Q. Yes, about.

83 A. The chute itself will hold I think,—I can tell by figuring how many square feet in the chute and in the car. It is about one and one-half times larger than the car.

1831 Q. About how wide is it.

A. The chutes are built for 40 feet chutes; that means 36 feet car length and leaving an open space between the two cars for couplings. It is supposed to be 40 feet. 40 feet is a double chute.

1832 Q. That is the length?

A. Yes.

1833 Q. How wide is it?

A. It ought to be about forty feet out to the alley and forty feet the other way.

1834 Q. The fences between those chutes are about how high?

A. Seven feet.

1835 Q. Where is the man at the time he does the counting? In the pen?

A. No sir, out in the alley. They open the gate and drive them out and as they crowd out of the gate he counts them.

1836 Q. They go through this alley into the pen?

A. From the chutes down the alley to the pens where they feed, water and sell them.

1837 Q. The count is made as they pass along through the gates?

A. Just as they come out of the gate out of the chute.

1838 Q. He makes the record right at that time?

A. Yes.

1839 Q. Now then, is that record preserved?

A. Why yes. We have all those for the last several years, every load we have.

1840 Q. Now, are any records made of crippled hogs?

A. Yes sir.

1841 Q. Tell us what is meant by a crippled hog?

84 A. When we unload stock and there is an animal that isn't fit to walk from the chutes to the pen and is left in the chutes, it is called a cripple. This cripple is tagged with a tin tag with a number and we recognize ownership from this. Say a car is consigned to Standard or Wood Brothers or any firm and the tag number is 20340, we charge that tag number to Wood Brothers or Standard as the owner of that hog. We have that especially for identification of the hog because so many different loads are unloaded at the same chutes, we would lose track of them if we didn't have some way of recognizing them.

1842 Q. Now, what is done with those hogs that are tagged as cripples?

A. Well, a commission man generally comes and looks them over and if he makes up his mind that if the hog has a little rest that he is going to get on his feet and go over the scale with the rest of the hogs, he takes him. If not the hog is turned over to the packers and then weighed by the Yard Company and the hogs are bought by the packers at a certain percent less than the load itself that went over the scales.

1843 Q. Now then, in some cases this tagged hog is actually driven over and delivered to the regular consignee?

A. A lot of hogs get in cars and get lamed up, stiffened up, if they are out in the chutes a while pretty soon they get up and run around. A commission man has to watch that and take care of them and put them in with the load and sell them in the load for the same money the load brings. After we have tagged them as a cripple if they can't walk we simply leave them in the chute so as not to lose them.

1844 Q. Now, with reference to the other hogs that are tagged as cripples and which are not taken as a part of the original load in the way you just described, what becomes of the rest of them?

85 A. They are taken to the pens and sold to the packers.

1845 Q. When they are left, are they left in an alley or a certain designated place? I am speaking now of the hogs which were

tagged as cripples but which were not taken as sound hogs by the original consignee?

A. They are taken by the packers and taken to a scale that we have especially for the weighing of crippled hogs. They weigh them there and a regular ticket is made out for the cripple there the same as the ticket made out for the rest of the load on the other scale and this ticket furnished to the consignee.

1846 Q. Then, in this way each hog is weighed separately?

A. Why yes.

1847 Q. And a record made of the tag number?

A. Yes.

1848 Q. What do you mean by the word "packers"?

A. Morse & Company, Swift & Company, any of them.

1849 Q. Any packing house?

A. Yes, any that gets them.

1850 Q. Does a certain packer have a certain time to get all the hogs in a certain department or alley or chute?

A. Yes, I think they alternate days at the chutes. Cudahy gets the hogs one day at the North chute and Swift gets them the next day. They alternate as to chutes.

1851 Q. You say that each hog that is tagged is weighed by one of your employes?

A. Yes sir.

1852 Q. Now, is a book record made of that at the time?

A. A scale ticket is issued. We have a copy of that.

1853 Q. Is that the only record that is kept by the Stockyards Company? Just the scale ticket?

A. We have another record that shows to whom the hog
86 was delivered at the chutes. Say Cudahy received that hog,—we will follow that hog to the scales and find the hog was weighed by him and taken to their packing house by Cudahy. One record follows the other.

1854 Q. Is that information conveyed in any way to the consignee and to the particular packing house that gets that hog?

A. The consignee gets his ticket and from that he makes his bill to collect his money for the value of the hog.

1855 Q. That ticket shows which car number the hog was unloaded from?

A. No sir. It shows the tag number of the hog and the weight of the hog. We check that tag number back to where it originated from the chutes.

1856 Q. That record is gotten from another book?

A. Yes.

1857 Q. Another record shows tag and car number together?

A. Yes.

1858 Q. Are those scale tickets and records still preserved?

A. Why yes, sure.

1859 Q. Now, when a hog is found dead at the time of unloading the car, what is the process, or the conduct of business in that respect?

A. The man that follows up takes the car number the dead hog was in and records the car number and the chute un-loaded in and

credits it with one dead or two or the number of dead hogs in the car. Then they check with the rendering company that weighs and buys them. One of our employes has a record of the weights of deads and who owns them.

1860 Q. Do all dead hogs go to the same rendering company?

A. Yes sir, the Union Rendering Company.

1861 Q. Is a record made of the number of deads that come from each car and the weight of that particular dead hog?

87 A. Yes sir.

1862 Q. You have all those records?

A. Oh yes.

1863 Q. Is that information conveyed to the consignee?

A. Yes, he gets a ticket the same as he does for a cripple.

1864 Q. That is the record he has for making a settlement with the Rendering Company?

A. Yes.

1865 Q. Are the ten yardmasters that you have now the same individuals that were yardmasters for the last few years?

A. Why yes. The newest one I have there has been working four years. All the rest are old-timers and have worked there for years.

1866 Q. Are the records of the count of the number unloaded and the records of the cripples and the record of the deads all made by these yard superintendents?

A. Yes, all entered by them. The hardbook shows all that.

1867 Q. Mr. Walters, if we were to undertake to all these ten yardmen and the records that would deal with approximately three hundred cars involved in this litigation, for the purpose of showing the number of animals unloaded in a few cases and the number of cripples unloaded, the number of deads unloaded and the weights of each, how big a proposition would it be as to length of time and number of books to be examined for the purpose of getting those records?

Mr. Dressler: Defendant object to the question and the information sought to be obtained for the reason that plaintiff is not in position to complain of the number of records or men involved since plaintiff itself has brought this suit and has placed in it the

88 number of causes of action which it desired.

1868 Q. This search would cover the time involved in the shipments commencing in the year 1913 and terminating approximately at the beginning of 1916.

A. I don't know. It would take an express wagon load or two of books or more. By the time they got through all these books to hunt up the different records for the car numbers and have them certified from the records they made, you wouldn't get through with that many cases in thirty days, I wouldn't think. There is an awful pile of books to go through.

Mr. Dressler: Defendant would like to suggest at this time that it has already employed two stenographers practically all the time since April 1916 up to the present time investigating the causes of

action involved in plaintiff's suit and it has not as yet completed to exceed one-half of the investigation.

1869 Q. How long a time would it take your employes, how many days' time in the total, to hunt up these records from your files and separate out the particular records that are involved in this litigation? Give us your best judgment on it.

Mr. Dressler: Objected to as immaterial.

A. I don't know how long it would take. I couldn't answer that question.

1870 Q. You could answer it better than we could, so give us your best judgment.

A. I don't know how long it would take them. It seems like an endless job.

89 1871 Q. Give us your best judgment. There are about three hundred cars covering a period of four years.

A. We could dig them up in four or five days, that is one man. He would have to have two records. He would have to look for the original record and from that find the other one. Somebody would have to furnish him a record to know what he was looking for.

1872 Q. During the hog shipping season approximately how many cars of hogs are received per day on the average?

A. That is a question. A person can hardly answer for the reason that they vary so.

1873 Q. You can help us some.

A. During the present season two hundred or better each day of hogs.

1874 Q. Now, how many different yard books are used each day in which these original entries are made of the cripples and deads and the number of hogs unloaded and the weights, approximately?

A. That depends on the number of trains received. Each train that is brought in has a book and that book has a number. It would perhaps be an average, you can figure twenty-five to thirty trains.

1875 Q. Now, illustrating the proposition, take item #201, which reads "car 4285, shipped from Burke, South Dakota, December 22, 1914, arrived December 23, 1914, the claim being made for three dead hogs." Now if we wanted to find your record for that particular car number, what would be the process of hunting it up and how many books would have to be examined?

A. Well, you have to get the day and the date, the month and the year. The books are tied up by the month; we would have to dig into them books and go through them all, look through all for the date that they arrived in order to find that shipment.

90 1876 Q. Then, having found the book or books that were used upon that day, then do I understand that you would have to commence with a certain book and go through as many books as might be used that day, which would average approximately twenty-five, until you happened to find the book that has this particular car number?

A. That's what you would have to do.

1877 Q. There would be no way of telling in advance of examination of the books which book would have this car number?

A. No sir. You would have to hunt through them all. If thirty books were involved you would have to go through the thirty. Might find it in the first one and it might be the thirtieth that you examined.

1878 Q. How long have you been connected with the business of the stockyards company in any capacity?

A. Thirty years.

1879 Q. In what different departments have you been engaged in work?

A. I started in as yardmaster when I came here thirty years ago from Chicago. I have been handling the records ever since I came here, made up all the Company's open orders and that stuff.

1880 Q. Are you also familiar with the general way in which the consignees and the packers and the rendering house keep their records and their business settlements as between each other?

A. Yes, sir.

1881 Q. Now, I want to know whether or not the consignees and the packers and the rendering house make their settlements as between each other upon the records that you have been telling us about, which are made from day to day by the Stockyards Company. Do they or don't they?

91 A. They do for the cripples and the deads, but the sale of the hogs in loads is barter and trade. There is a standard price for the dead hogs and a standard price for crippled hogs. They make their settlement from the weights of the hogs that the Stockyards Company furnish them and put in a bill to the packer or to the rendering company for the dead or the cripples and they pay them on that basis, but as to the load itself and the number of hogs that is barter and trade. They have to agree on prices from weights the yard company furnishes to the consignee and the purchasers also take those weights and from that they settle.

1882 Q. Now, you say there is a standard price for dead hogs. tell us about that?

A. Yes sir.

1883 Q. What is it?

A. I don't know just what they are. Since hogs have been going up they have advanced the price of deads. It used to be One Dollar per hundred and any hog that weighed less than a hundred pounds the rendering company refused to pay anything for. If a hog came in on a train that had been enroute so long that it had begun to mortify, what they termed a rotten hog, they refuse to pay the consignee anything for it, or for anything less than a hundred pounds.

1884 Q. With the exception then of the hogs under a hundred pounds and the rotten hogs, the standard price was one cent a pound?

A. That was quite a while ago. They are paying more for them now. I don't know what the advance in price is.

1885 Q. About when did this advance in price come? About how long ago? Was it subsequent to January 1916?

92 A. I don't know when they did raise. They pay more now. All I have to do is to furnish records of the weights. I know they are selling for more money. How much more I don't know.

1886 Q. Now, sometimes hogs are received with a tag already on as I understand it. Is that correct?

A. A lot of farmers have ear tags on hogs that come in here.

1887 Q. That would be a number?

A. We don't recognize that number. We don't make any record or know anything about it or pay any attention to it.

1888 Q. No record of identification as between them?

A. No.

1889 Q. Your record shows nothing about that?

A. No.

1890 Q. Now, supposing that a hog came in and it had a tag on at the time of arrival and you also tagged it as a cripple, would your record show the previous tag or wouldn't it?

A. No sir, nothing but our own tag.

1891 Q. Do your record show anything about stags?

A. That's down at the scales. The Livestock Exchange records show all dockage that there is on hogs.

1892 Q. Either for piggy sows or stags?

A. That is kept by the Livestock Exchange. They have a complete record of that in their office.

1893 Q. Where, if you know, do they make that record?

A. They make that record after the hog is sold, as it passes across the scales. The dock is always settled then.

1894 Q. Practically after you have ceased to have any connection with them?

A. Yes.

1895 Q. Except that they are still in the yards?

93 A. Still in the yards.

1896 Q. What constitutes the Livestock Exchange? What is it?

A. The Livestock Exchange is all the men doing business over there as livestock commission merchants.

1897 Q. Is it a separate organization made up by those people, by the commission houses?

A. Yes sir, entirely separate from the stockyards end of it. It is an organization of their own.

1898 Q. About how many dealers are there on the South Omaha Stock Exchange?

A. I think about fifty-two commission firms.

1899 Q. How many members are there, approximately, of the Livestock Exchange?

A. I think better than five hundred members including all.

1900 Q. Now who is it that makes the record and determines in the first instance with reference to dockage?

A. The Public Shrinker.

1901 Q. How many of those?

A. One at each scale.

1902 Q. How many scales, about?

A. Four.

1903 Q. Who chooses or employes this Public Shrinker.

A. The Livestock Exchange.

1904 Q. The Public Shrinker is an employe by the years or for longer periods?

A. Yes sir, forever if he does his work right.

1905 Q. In case of dispute as to his ruling or determination, is there such a thing as an appeal?

A. They have an Arbitration Committee that settles it.

1906 Q. Does that Arbitration Committee examine the hogs themselves right at the time or shortly thereafter?

94 A. When a dispute arises over the dockage the hogs are yarded separately, locked up, subject to the inspection of the Arbitration Committee, who tell them to let them out in the alley where they can look them over thoroughly and their decision is final as to dockage.

1907 Q. Then are settlements between the consignor and the consignee as to the question of dockage dependent upon this decision of the shrinkers or the Arbitration Committee?

A. Final settlement is made, as far as dockage is concerned, on their decision.

1908 Q. Is this Stockyards Company that you represent the only stockyards company in South Omaha?

A. Yes sir.

1909 Q. That's the only one that has been in existence for a good many years?

A. Ever since I have been here, thirty years, the only one.

1910 Q. Then in the conduct of the live hog business at South Omaha all hogs that are shipped there go through your company and under your supervision?

A. Yes sir, all come to our yards.

1911 Q. Your company is a corporation?

A. Yes sir.

1912 Q. Are your rates fixed by statute?

A. They are fixed by the Railway Commission, yes. It has jurisdiction over the rates of the Yards.

Mr. Dressler: I would suggest in the record that that jurisdiction did not attach, I think not, during any of the time covered by the shipments in question, but only by act of the last Legislature.

95 A. Yes, it did. They have been at that,—it has been five years since they put us under the Railway Commission. When they took it over they made us take a valuation, then they made us determine where the dividing line was between the stockyards and the railroad end of it. They called the inside line of the chute fences the dividing line between the stockyards property and the railroad end of it.

1913 Q. About how long ago did that occur?

A. It seems to me five or six years ago or more. Anyway that long

1914 Q. That was to determine,—to make a distinction be-

tween your business as a stockyards and your business as a railroad?

A. Yes, we are all under the Railway Commission. Just as an instance, you see we have been feeding all summer here corn costing $1.57 a bushel and they wouldn't let us charge over a dollar for it. It put us just $45,000.00 to the bad, they have that much authority. They simply say we have to stand for it. We have to put up a bond of $5,000.00 with the State of Nebraska. Here we are feeding corn that costs $1.57 and getting a dollar for it. They go just that far with us. Talk about authority, they sure have it.

1915 Q. Speaking generally, Mr. Walters, how long has your Stockyards Company been under the supervision and control of the Nebraska State Railway Commission?

Mr. Dressler: Objected to as calling for opinion and conclusion of the witness.

A. I don't know, but it seems to me five or six years anyhow. It may be longer; I don't know.

1916 Q. Now, are all of the records of all these shipments
96 that I have asked you about—are they now under your supervision or your control here at South Omaha?

A. Yes, sir.

Cross-examination.

By Mr. Dressler:

1917 Q. Those records are available at the present time, are they?

A. Sure they are.

1918 Q. You spoke of trains. What do you mean by trains coming to the chutes? Whose trains?

A. Various trains delivered by various roads. The North Western, Burlington, Missouri Pacific, M. & O., U. P., Rock Island, Great Western.

1919 Q. Take this illustration,—Supposing the North Western brings in five carloads of stock in a way freight, for instance, and sets them on your transfer. What kind of a train would you call it and what number?

A. We wouldn't call it any number any more than five cars of stock on the North Western.

1920 Q. Would you give that a train number?

A. No, we wouldn't give it a train number. The book that we used in the yards for that train, that would have a number. Suppose it was on book 20, you would look back to #20 and find them five cars.

1921 Q. You speak of having a book for each train each day?

A. Yes. As many as twenty-five or thirty books.

1922 Q. How do you indicate the different trains? Do you give each a number? Does the Stockyards Company give a train number to a string of cars which may be placed for it on the North Western transfer, for instance?

A. It gets no number until after it arrives at the chutes.

97 1923 Q. What is the occasion for having a large number of books each day to record the arrival and unloading of stock?

A. We have it for the convenience of the business people over there. Twenty people might want one book while the stockyards is using that book. Suppose a commission man wants it,—we use the book while making our record and after that we file this book in the rack where they are kept for the information of the commission men. Then he can get that book. If we kept these books all in one, it would be in use all the time and nobody could get any information.

1924 Q. Each book is in charge of a different employe?

A. Yes, each book is taken out by some certain yardmaster and a full record made. When that record is complete that book comes back to the house for the benefit of the commission men.

1925 Q. When is a particular book,—say Book #1, when is that first started out? When do you first start recording information in it?

A. 3:00 P. M. each day is the beginning of a day.

1926 Q. I mean with reference to the shipments coming into the transfer? What do you first put in the book?

A. The first thing they do with the book is to take the car number. Either the cars will be waiting at the chutes or as they pass by he takes the car number. The book is taken in and consignee and consignor is put on. The man that follows up on the platform to take care of the dead, he puts down the time the train was switched ready to start to unload, then he puts down when it was actually unloaded.

1927 Q. Is that what you have referred to as the unloading record?

A. Yes.

98 1928 Q. Now, when the Stockyards Company gets a string of cars off of the transfer of a certain railroad, they are taken to what chutes?

A. The chute that is empty.

1929 Q. How many chutes at the stockyard?

A. Three.

1930 Q. Just three unloading chutes?

A. At one chute we can unload sixty cars without moving any stock. Another chute can unload forty cars without moving any stock, the other chutes unload 116 cars without moving any stock. They are all double chutes.

1931 Q. By the term "chutes" you mean a series of unloading chutes for each individual car?

A. Most everybody calls them pens.

1932 Q. You can unload more than a hundred cars at a time?

A. Oh, yes.

1933 Q. About how many at a time?

A. Well, we can unload,—if all the chutes are set full to capacity we can unload about 100 cars to a set,—a little more,—about 108

1934 Q. How many employees are there to take care of the actual opening of a car door and driving the animals out?

A. I have about,—at the South chutes I have about twelve men, ten to twelve men on the platform and seven men on the other.

1935 Q. These men,—these seven or twelve men would take a string of cars that might be switched to a particular series of chutes and unload them one after the other?

A. Yes.

1936 Q. There probably would be some time elapse between the time a particular car in a string of cars was set for unloading
99 before it would be reached by the employees to unload it.

A. Yes, twenty-five cars in a string, say, with cattle and hogs mixed, we can unload twenty-five cars in fifteen to eighteen minutes.

1937 Q. How many employees do the work of unloading one car?

A. If it is hogs, two men; really three. I have one on the platform on the opposite side when they go into the chutes. A man there has a prod-pole, he goes after the door is opened and starts the hogs out from the door. Two men go along, one goes on each end, they run them out both ways.

1938 Q. A man on the opposite side from the open door where the hogs go down the chute, he starts them up?

A. He starts them out; for cattle he does the same thing.

1939 Q. These three men who are employed in unloading a car of hogs; do they do any counting?

A. No sir.

1940 Q. No counting is done at all as the hogs run out of the car and move down the run-way to the chute?

A. No sir.

1941 Q. The first counting is done after the unloading is complete and the hogs are all in the chute?

A. Yes sir.

1942 Q. How are the unloading platforms arranged so that the hogs can't escape from the car?

A. There is a space between the car and the platform which would permit the cars to come in without rubbing up against the platform. There is a good wide bridge put into the car and *unto* the platform. Once in a while we drop a hog but when we do it is put back into the car. Windgates go up on each side of the bridge to form a pen. It forms a narrow alley out of the cars.

1943 Q. Supposing now you have say, one hundred carloads of hogs unloaded at one time. How many sets of yardmasters,
100 as you call them, would you have to go along the different pens or chutes where the hogs were unloaded to make the count?

A. I have two at each chute.

1944 Q. Each set has sixty or forty unloading pens?

A. At the South chutes we have a bigger number.

1945 Q. How many at the bigger number of chutes? How many pens?

A. Fifty-eight chutes, double, 116 cars at that one string of chutes.

1946 Q. On 116 chutes you would have a crew of three or four counters?

A. Yes, I have about twenty-five or more yard men.

1947 Q. So a particular car of hogs might not be counted for several minutes or half an hour or more after unloading?

A. Yes, say there is a car in the middle of the train. If the commission men don't come around and ask for them, they may be at Chute one, and it be ten or fifteen minutes before they get to chute twenty or thirty.

1948 Q. Is any counting done before the commission men put in an appearance?

A. Oh yes, we don't wait for them.

1949 Q. What is done with the hogs after they are counted in the manner which you describe?

A. They go from the chutes to the pens where they are fed and watered.

1950 Q. And where would a particular carload of hogs be required to go to get to the Standard Commission Company pens or place where they are permitted to corral them?

A. There isn't any assignment of pens on hogs.

1951 Q. How far would they have to go generally?

101 A. The Hogs at the South chutes go just across the alley to get into the hog yards.

1952 Q. And other places how far?

A. At the East chutes, chute #1 is about a hundred and fifty feet from the first hog pen; about the same distance from the North chute, as you go back further at each chute you just add thirty or forty feet further away from the hog pens on the North chutes and East chutes, but at the South chutes all the way along you just go right across and go right into the pens.

1953 Q. So that a particular carload of hogs might be driven anywhere from twenty to one hundred fifty feet after being unloaded before they would reach——

A. Travel a greater distance than that.

1954 Q. How far do some of them have to travel? How much greater distance?

A. I don't know.

1955 Q. As much as a quarter of a mile sometimes, isn't it?

A. Eight hundred or nine hundred feet would take any of the hogs to the yards.

1956 Q. The hog shipments are unloaded at whatever set of chutes is most convenient, is that true?

A. Whenever a chute is empty and not working, we keep it going.

1957 Q. These yardmasters or counters make their count when they get around to a particular chute pen where a hog shipment is as the hogs move out through the gate into some alley?

A. Yes.

1958 Q. Do those counters put down their count in a book right then?

A. Yes sir.

102 1959 Q. Is that the book which you have on file now?
A. Yes sir.
1960 Q. Do they transfer their record of the count to any other book?
A. They don't.
1961 Q. Does the Stockyards Company?
A. The Stockyards Company transfers that record into what we call the big record book, which shows consignee, consignor, shipping point and gives more information than the little book.
1962 Q. You still have the little books?
A. Oh yes.
1963 Q. Are those original records?
A. Yes.
1964 Q. When does the follow-up man come to a particular car with reference to a particular load driven out of the car into the chute pen?
A. He is right after them all the time. He pulls the bridges out. They are never more than a car or two ahead of him.
1965 Q. Just one man for that work to each chute?
A. Just one man that follows up and takes care of the deads, sees that the bridges are pulled out and everything clear so the cars can be pushed out.
1966 Q. He is the fellow who would discover any dead hogs which might remain in the car?
A. That is his business, to take them out and take the car and chute number.
1967 Q. Supposing there should be a dead hog that was in the chute after unloading, would he make a record of that?
A. In the chute?
103 1968 Q. In the chute pen after unloading? A hog might die in there.
A. He wouldn't get that. We have a man, what we call a "cripple man," that man comes along and drives these hogs out of the chutes and if anything is left in the chute it is his duty to take that animal, attach a tag and make a record of it. He checks with the yardmaster, and says, "a cripple for so and so," Standard or Wood Brothers or Clay-Robinson or whoever owns that load of hogs. If there is a dead hog left in the chute when he comes along, he would check to know who it belongs to and then they mark a dead on their book.
1969 Q. What different record would you make for a hog left dead in the car and a hog which was found dead in the unloading chute or some other part of the yards? What different record would you make for those two?
A. When they find one in the car dead, they just mark a dead. That is the record of a hog taken out of the car dead. As far as a hog dying in the chute is concerned, we would just mark it Dead in the chute. It would show that this hog got here alive and died after he was put in the chute.
1970 Q. If he died in the commission company's pens what record would be made?

A. We don't make any record of that other than the man gets a record of that dead hog. The man that does the delivering of the hogs in the pens for the commission men keeps a record of everything that comes in. He gets a record of it and reports to the chute house and then we get the dead hog, it is brought over to the platform and weighed and ticket issued for it just the same as the ticket issued for one dead in the car. Our chute books or any records we have in the office, other than the dead hog book, wouldn't
104 show that that hog was dead at all.

1971 Q. If the hog died in the chute pen after being unloaded?

A. That record I would get.

1972 Q. After that you get no record?

A. I would get no record other than any dead hog when the man gathers them up we issue a ticket for after weighing them up.

1973 Q. Now then, a cripple such as you make a record of is merely one that, as your yardmasters count the hogs out of the unloading chute, they think will not be able to walk along with the balance of the herd?

A. The cripple man drives them out and if he finds a hog that won't walk, we just simply put him in the alley and take a chance of losing him. We know if he is in the chute he is safe there.

1974 Q. Is the cripple man a different employee than the yardmaster?

A. Yes.

1975 Q. When does he inspect the bunch? Before they are taken out for the count?

A. Yes, and he makes his report.

1976 Q. Is there more than one cripple man?

A. Yes.

1977 Q. How many cripple men are there?

A. One for each chute.

1978 Q. He goes along with the counters?

A. Suppose a yardmaster would leave a load of hogs out, the cripple man would get a record and say, "Chute 10, cripple." "Who does it belong to?" "It belongs to the Standard." Then he takes that cripple and makes the record.

1979 Q. So far as the cripple man is concerned, he would take the word of the commission firm that there was one or two?

105 A. Oh no, he must find the cripple and tag that hog.

1980 Q. What is the process of marking the cripple? Is it the tag issued or what is it?

A. We have to have a tag for identification.

1981 Q. Do you have any other record for cripples than that you have issued tags for criples, that's what I mean. A commission man might think that a hog was crippled and if so, report to the cripple man?

A. Yes.

1982 Q. If the cripple men were there and didn't tag the animal for some cause, would there be a record made of that cripple?

A. Yes, the yardmaster would have a record.

1983 Q. Your yardmaster makes a record based on what the commission man says about the cripple?

A. It is the yardmaster's business to know he is there.

1984 Q. The cripple man might come along and the animal have recovered and he wouldn't issue any tag for it?

A. In a case of that kind he would tag him anyhow. We have a man that follows the chutes with a wagon and when we find a hog is recovered and all his stiffness is gone and he is able to walk across the scales, the Stockyards Company takes the hog down to the pens and saves the shipper that much money.

1985 Q. He would sell for a good hog?

A. Yes.

1986 Q. How far is it from the door of the car down the runway to the chute pen floor?

A. Well, the East and South chutes are built with an incline that runs from the platform down to the level of the chutes. The North chutes are on a level with the car all the way
106 through.

1987 Q. Where the incline occurs how long is that incline?

A. The incline is about sixteen feet at the South chute and about fourteen feet on the East.

1988 Q. How much of an angle is that incline? How steep?

A. Ten feet. I think there would be a raise of about three feet.

1989 Q. On the other one?

A. Very gradual.

1990 Q. On the other one?

A. About the same, very gradual.

1991 Q. Those runways are cleated so as to prevent animals from slipping?

A. Rough concrete.

1992 Q. Hard to get a foothold?

A. You couldn't slip on them.

1993 Q. Bedded with straw or sand?

A. No. They are made especially rough. You couldn't slip on them.

1994 Q. Coming down from the platform are hogs sometimes injured. Have you ever observed anything of the kind, a hog getting crippled in such a manner that they couldn't walk coming down those chutes?

A. Never have, no. As to anything of that kind we would have to remedy the condition of things so that wouldn't occur. It would come back on the Stockyards Company.

1995 Q. Is any record made aside from the mere notation of a cripple as to what constituted the crippled condition?

A. No.

1996 Q. No record of broken legs or broken bones?

107 A. There is one other record we make. If a lot of hogs come in, with cripples in, but the cripples are boxed in a corner of the car, have a board across and a cripple or two put in there, we make a separate record of them.

1997 Q. What does the man record?

A. He shows one or two cripples hogs boxed in. The fellow down below in the chutes just calls them cripples. We can follow them back and check up the record.

1998 Q. The record which you have referred to as being available now merely shows the record of a cripple, but it might mean that it was a cripple which had been found boxed off in the car? Is that true?

A. We have a special record of it. Where they are not boxed off the only record we have is a cripple in the chutes.

1999 Q. The record which a cripple man makes down in the unloading chute is simply a record which says "cripple?"

A. That's all.

2000 Q. That may mean the ordinary cripple coming down the chute or it may mean a boxed-up cripple in the corner of the car?

A. As far as he is concerned you wouldn't know.

2001 Q. You would have to go to a different record to find out whether he shipped the load that way or whether it was the ordinary case of crippling?

A. Yes sir.

2002 Q. Are your records of boxing off cripples available?

A. Oh yes.

2003 Q. Who makes that record?

A. The man that follows up on the platform and takes care of the dead hogs.

108 2004 Q. With reference to dead hogs, does your follow up man make any record except the bare fact that the hog was dead?

A. Yes.

2005 Q. Any record of the condition of the hog?

A. He makes a record of the condition he finds the dead hog in and makes a record of the condition of the car. If the car is in bad condition he makes a record, say "five dead, car bad condition." He makes a record of the condition of the car.

2006 Q. Does he specify what defects?

A. Just says "bad condition."

2007 Q. If the car contains a dead hog and the car isn't in bad condition?

A. He makes no record of the car, just says "one dead."

2008 Q. If his record, where he makes a record of a dead hog, is clear otherwise it means the car was in good condition?

A. Yes, that's what it would mean.

2009 Q. The cripples you say are delivered to a particular packer, which may be the indicated one to buy all cripples that day?

A. Yes.

2010 Q. The cripples are weighed by the Stockyards Company?

A. Yes sir.

2011 Q. And a scale ticket issued by the Weigh-master?

A. Yes sir.

2012 Q. Is that scale ticket preserved?

A. We give one ticket to the consignee, the commission man, and one we keep ourselves.

2013 Q. The ticket is made out in duplicate?
A. Yes.
2014 Q. Both copies would be original?
A. Yes.
109 2015 Q. You have those in your records?
A. We have the one. We give him the pasteboard end of it.
2016 Q. With reference to dead hogs, are they weighed by the Stockyards Company?
A. Yes.
2017 Q. And a similar scale ticket made?
A. Yes.
2018 Q. Original ticket still available?
A. Yes.
2019 Q. As part of the records of the Stockyards?
A. Yes sir.
2020 Q. How many Weigh Masters does the Stockyards have?
A. Fourteen Weigh Masters; No, fifteen or sixteen Weigh Masters. There are sixteen scales at the yards.
2021 Q. With which to weigh livestock?
A. Yes sir.
2022 Q. One for each scale?
A. Yes, one Weigh Master.
2023 Q. Is each Weigh Master assigned to a particular scale or do they change about?
A. He is assigned to a scale and stays there. Sometimes they are switched around.
2024 Q. There would be a record of any particular day, of what Weigh Master was assigned to a particular scale?
A. Yes.
2025 Q. The ticket of the weight shows the scale on which it was weighed and the name of the Weigh Master, does it?
A. Yes, all turned in once every thirty days to the filing office in the basement of the Yards office.
2026 Q. How many employes are there of the Stockyards Company who have keys to the chute pens where hog shipments are unloaded?
110 A. Nobody has keys only those that have authority to unlock gates and do the yard work.
2027 Q. How many are there?
A. We have 317 men on the pay-roll. Possibly 250 keys anyhow.
2028 Q. That is the average number given out?
A. I should say that many.
2029 Q. As the counters go to the chute pen to do the counting as the cripple man drives the animals out, who unlocks the gate for them?
A. The yard-man may unlock it or he may unlock it himself. Some yard employee is supposed to unlock gates for the yard-masters.
2030 Q. How long before the yardmaster comes along?
A. He is supposed to be there with him; generally is with him.
2031 Q. Does he go along to the chute pens and unlock gates for the counters as they come along?

A. The yard-man does.

2032 Q. Sometime precedes the counters a few chutes?

A. Yes, within a chute or two. Generally he is right at the chute.

2033 Q. He may be several chutes distant on a particular occasion?

A. Yes.

2034 Q. There might be occasions and probably are when a particular chute pen would remain unlocked between the time of unlocking and the time when the counters came along?

A. Well, no, the yardman don't go away, He unlocks the gate, and he opens the gate and drives the stuff out or he wouldn't unlock it.

2035 Q. Does the yard man sometimes drive the stuff out for the Counters?

111 A. Yes, he drives them out for us sometimes.

2036 Q. Before the counters get around?

A. The counter is in the alley to catch them as they go by.

2037 Q. The counting is done while the animals are on the move?

A. Yes.

2038 Q. How wide is the alley?

A. It is fourteen feet.

2039 Q. The man who does the counting stands along one side?

A. Yes.

2040 Q. Inside the alley?

A. Yes sir.

2041 Q. As the animals run past he counts them?

A. Yes.

2042 Q. Just one count made?

A. As a rule, yes.

2043 Q. Is there anybody who checks up the cripple man, as you call him, to see whether or not the hog is in fact entitled to be classified under your scheme of things as a cripple?

A. The commission men look after it pretty closely themselves. If they have a cripple they will go down to see if there is any chance for it to walk across the scales. If it can it is one hog more for them.

2044 Q. If able to walk across the scale platform you haul him up there and he wouldn't be entered as a cripple?

A. No, he sells for what the rest of the load sold for.

2045 Q. Sometimes does it occur that after the cripple man has tagged an animal as a cripple that the commission men come down and dispute the fact of it being a cripple and you then haul the hog up to the scales and sell him as a good one?

A. We haul lots of cripples that way. We don't argue with

112 them. All we do is to take the hogs up and we are glad to.

2046 Q. It does occur that after you have made the record of a cripple, very often you will, after conference with the commission men, haul the hogs to the scales?

A. We wouldn't have any further record.

2047 Q. The hog might easily sell for a good hog the same as the rest and you have a cripple marked?

A. The only thing it would be delivered to the commission men and his count would have to show that additional hog over the scales.

2048 Q. Your cripple record would still stand?

A. Yes.

2049 Q. It would show also that this crippled hog went to the commission firm and not to the packer?

A. Some other record would show it. These records show each cripple, say a cripple in chute 10, belonged to the Standard, the record shows it delivered to Cudahy. That is a cripple. In chute 10 this hog was all right, we hauled it for them, and delivered it to the Standard, then the book would show delivery to the Standard.

2050 Q. In order to have your cripple record have any accuracy as to whether or not the hog sold as a cripple, you would have to see who bought the hog? You would have to follow it up that way?

A. Follow the record clear through to the scales.

2051 Q. To see whether it sold as a cripple?

A. We often take them over and then when they go on the scales they wouldn't walk and we still sell them for a cripple.

2052 Q. The Union Rendering Company, is that company related to the Stockyards Company in any way?

A. Has nothing to do with it. It is a separate outfit all together.

113 2053 Q. When the dead hogs are taken from the cars to the Union Rendering Company, who does that?

A. Where a hog is dead in the car, that hog is taken from the car and put on the platform.

2054 Q. On the unloading platform?

A. Yes.

2055 Q. Who takes it from there?

A. The hog is weighed and then taken up where they have a quantity of hogs all piled up in a pile and put into a box-car and taken to the rendering plant.

2056 Q. They do the rendering some place three or four miles away?

A. Yes, about ten miles away.

2057 Q. Who does that for them, the Stockyards Company?

A. They have a man over there who handles the dead hogs for them. Our man is with this fellow all the time until these hogs are weighed.

2058 Q. What scale are the dead hogs weighed on?

A. We have a Fairbanks scale on wheels.

2059 Q. You have one for each unloading chute?

A. Yes.

2060 Q. Sets right there?

A. Yes.

2061 Q. Does the Union Rendering Company take away all the dead hogs each day?

A. Yes, every day they are supposed to get them loaded by three o'clock.

2062 Q. Once each day?

A. Once each day.

2063 Q. Have you ever observed, Mr. Walters, there is any class of hogs which usually gets into trouble and is called a cripple. If there any particular kind of a hog that will be unable to walk
114 I mean as to weight or size or disposition or anything of that kind?

A. A hog that is real fat is easily crippled. I know a good many hogs come in where there seems to be something wrong with the hog before it is ever put in the car. They are poor, hurt across the back and dragging along or something like that.

2064 Q. Drag their hind feet?

A. Yes, by reason of some spinal disease.

2065 Q. There are spine diseases which hogs have which render them cripples?

A. Yes, lots of them come in that we classify as cripples.

2066 Q. In cases where they have a stag or two in a load of hogs, are there more cripples from that class of load than where there are no stags, if you know?

A. No, I have never paid much attention to the hog end of it. That's always true with cattle. With boars in the car of hogs there is an element of cripples. But I have never paid much attention. Once in a while, where they have a boar in a car they cripple the other hogs up, but that isn't very often.

Redirect examination.

By Mr. Courtright:

2067 Q. Mr. Walters, with reference to all of the facts and circumstances and conditions that you have testified about either on direct or cross examination, you have records showing those facts?

A. Oh, yes.

2068 Q. Now, were those records made by your employees immediately at the time of ascertaining the information?

A. Yes sir.

2069 Q. Now, subject to the inherent imperfections of human nature and recognizing that humans are not infallible and
115 that they do sometimes make mistakes, now subject to that what do you say as to the correctness of those records?

Mr. Dressler: I object to that as incompetent, hearsay, and calling for conclusion of the witness.

A. They are as correct as we can get them. We think they are correct, at least.

Mr. Dressler: I move to strike the answer for the same reason given above.

Witness excused.

116 And afterwards, to wit, on the 6th day of October, 1919, the appellant, Chicago & Northwestern Railway Company, filed in the office of the Clerk of said Supreme Court its briefs as

required by the rules of said Court, which briefs contained the various Assignments of Error made by it on its said appeal and the following are true copies of assignments numbered 1, 6, 7, 15, 16 and 17 as contained in the briefs of appellant so filed:

I.

The verdict is not sustained by sufficient evidence.

VI.

The Court erred in giving to the jury instruction number one requested by the plaintiff.

This instruction is found at page 23 of the transcript, as follows:

"You are instructed that by the Statutes of the State of Nebraska when two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight to the consignee of the freight in the same order in which such freight was shipped."

VII.

The Court erred in giving to the jury instruction number two requested by the plaintiff.

This instruction appears at pages 23 and 24 of the transcript, as follows:

"If you find from a preponderance of the evidence in this case that the defendant utilized the facilities and services of Union Stock Yards Company of South Omaha for the delivery to the consignee of the freight involved in this action, then the defendant is responsible for all of the acts or omissions, if any, of said Union Stock Yards Company to the same extent as if the defendant had itself operated said yards and terminal facilities."

117 XV.

The Court erred in refusing to give to the jury instruction number seventeen requested by defendant.

This instruction appears at page 30 of the transcript, as follows:

"You are instructed that under the contract of shipment involved in all of the causes of action sued upon in this case, the defendant is not liable for any deaths, crippling or loss of animals not occurring on its own line, and you are not at liberty to find defendant liable for any damages due to death, crippling or loss of hogs which, you may find, occurred while the shipments were in the hands of the Union Stock Yards Company at South Omaha."

XVI.

The Court erred in overruling defendant's objections to the evidence offered by plaintiff contained in the Union Stock Yards' record book as testified to by the witness Leidlaw which evidence was incompetent and hearsay and prejudicial.

XVII.

The Court erred in taxing an attorney's fee of six hundred dollars in favor of the plaintiff and its attorney.

And afterwards, to wit, on the 15th day of May, 1920, there was filed in office of the Clerk of said Supreme Court a certain Motion for Taxation of Attorney's Fees, in the words and figures following, to wit:

In the Supreme Court of Nebraska.

No. 21,056.

NYE SCHNEIDER FOWLER CO., Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Motion.

Comes now the plaintiff and appellee and moves the court, in case it affirms this judgment, to tax as costs a reasonable attorney's
118 fee for the attorney for appellee in the supreme court.

This motion is based upon chapter 134, 1919 Session Laws of Nebraska, which by an amendment to section 6063 provides:

"And in event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court," and upon the case of Nye Schneider Fowler Co. vs. Bridges, 98 Neb. 863, which says:

"In such case it has been determined in this state that attorney's fees to be so taxed as costs relate only to the remedy, and are to be so taxed without regard to whether the contract sued upon was entered into before or after the enactment of the statute."

Under this decision, these costs are taxable in accordance with the law in force at the time of trial. This statute was in force at the time appellee prepared the brief in this court and the time appellee's legal services were rendered.

Appellee prefers to leave the amount of the fee to the court without any showing or suggestion of the amount if that plan is agreeable to the court.

COURTRIGHT, SIDNER, LEE & JONES,
Attorneys for Appellee.

Notice.

To Wymer Dressler, Attorney for Defendant and Appellant:

You are hereby notified that appellee will file the foregoing motion in the supreme court of Nebraska in the above entitled action and call the same for hearing at the time that said case is reached on the regular call for argument.

COURTRIGHT, SIDNER, LEE & JONES,
Attorneys for Appellee.

We hereby accept service on the foregoing motion and notice this 13th day of May, 1920.

PAUL S. TOPPING,
WYMER DRESSLER,
Attorneys for Defendant and Appellant.

119 Endorsed: 21056. Nye Schneider Fowler Co., vs. Chicago and Northwestern Railway Company. Motion. Supreme Court of Nebraska. Filed May 15 1920. H. C. Lindsay, Clerk. Courtright, Sidner, Lee & Jones Attorneys, Freemont, Nebraska.

And afterwards, to wit, on the 21st day of May, 1920, there was filed in the office of the Clerk of said Supreme Court certain Objections, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

No. 21056.

NYE SCHNEIDER FOWLER CO., Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Objections.

Comes now appellant and objects to the allowance of any attorneys' fee in favor of the attorneys for appellee in this case as suggested in motion filed by appellee in this court in pursuance of Chapter 134, Laws of Nebraska, 1919, amending Section 6063, Revised Statutes of Nebraska, 1913, for the reason that to tax said attorneys' fee will deprive defendant of its property without due process of law and deny to the defendant equal protection of the

law in violation of the Fourteenth Amendment to the Constitution of the United States, and that said pretended statute is void for said reasons and is not retroactive and cannot be made to apply to causes of action accruing prior to enactment of the statute.

Dated this 13th day of May, A. D. 1920.

WYMER DRESSLER,

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Attorneys for Appellant.

Endorsed: No. 21056. In the Supreme Court of the State of Nebraska. Nye Schneider Fowler Co. Appellee, vs. Chicago and North Western Railway Company, Appellant. Objections. Supreme Court of Nebraska. Filed May 21, 1920. H. C. Lindsay, Clerk. Wymer Dressler, Paul S. Topping, Attorneys for Appellant.

120 And afterwards, to wit, on the 27th day of September, 1920, there was rendered by said Court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to wit:

Supreme Court of Nebraska, September Term, A. D. 1920.

No. 21056.

NYE-SCHNEIDER-FOWLER CO., Appellee,

v.

CHICAGO & N. W. R. CO., Appellant.

Appeal from the District Court of Dodge County.

Sept. 27.

This cause coming on to be heard upon appeal from the district court of Dodge county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that the judgment of the district court allowing the sum of $600.00 for plaintiff's attorneys' fees in that court be, and the same hereby is, reduced to the sum of $200.00, and it is further ordered that should plaintiff file a remittitur in the amount of $209.01 from the judgment of $802.27, within twenty days from the entry hereof, leaving a judgment of $593.26, said judgment of the trial court should be affirmed, otherwise said judgment will be reversed and cause remanded for further proceedings. It is further ordered and adjudged that plaintiff be allowed the sum of $100.00 for his attorneys' fee in this court.

Opinion by Flansburg, J.

Aldrich, J. not sitting.

A. M. MORRISSEY,

Chief Justice.

121 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following to wit:

122

No. 21056.

NYE-SCHNEIDER-FOWLER CO.

v.

CHICAGO & N. W. R. CO.

Opinion.

Filed September 27, 1920.

1. A railroad company is liable for damage to live stock carried by it, except for such damage as results from the act of God, the public enemy, the fault of the owner, or the natural propensities of the animals.

2. When live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and is delivered later to the consignee in a damaged condition, a prima facie case is made against the railroad company by reason of a presumption that the damage resulted from some cause other than one which would exempt the company from liability.

3. Such presumption is not evidence and expires when sufficient evidence is introduced of the facts, out of which the damage grew, to support a finding that the damage was from a cause for which the company would not be liable.

123

4. A book record, kept by the stock yards company, of dead and crippled animals received in shipment, kept in regular course of business and as a record upon which the transactions with the packing companies, purchasing hogs, is based, is not rendered incompetent, as not being a book of original entry, from the fact that the entries are made by a clerk from data collected by various other employees.

5. When a railroad company makes a contract to deliver live stock at a point beyond its own line, it becomes liable for the default of the connecting and terminal carriers under section 6058, Rev. St. 1913, and cannot, in the event of such a contract, limit its liability as a carrier to its own line.

6. Though such statute fixes a liability on the initial carrier for the default of another carrier and gives no express right of reimbursement to the initial carrier, the initial carrier has the right of reimbursement from the connecting carrier under the general principle of subrogation, and the statute cannot

be said, on that objection, to be unconstitutional as depriving the initial carrier of its property without due process of law; nor is the statute unconstitutional as denying such carrier the equal protection of the law.

124

7. An instruction that "The burden of proof is upon anyone * * * to establish * * * such several allegations as he asserts that are material to such one's success," is improper and misleading, but held not reversible error in this case, since other instructions definitely cover the subject.

8. In passing on the credibility of witnesses, the jury are not required to lay aside their general knowledge which comes from the common experience of mankind, and an instruction to that effect is not improper.

9. Section 6063, Rev. St. 1913, making provision for attorney's fees to plaintiff's attorneys, upon claims against a railroad, held to allow recovery in the nature of reimbursement of costs and not unconstitutional as providing a penalty in favor of an individual.

10. An attorney's fee to be reasonable, under such a statute, should be based upon a consideration of the value of the attorney's service to his client and the amount of time and labor expended by him, but should not bear an unfair proportion to the amount of the judgment recovered.

125 FLANSBURG, *J.*:

Plaintiff is a stock shipper and brings this action to recover for damages to hogs during shipment to South Omaha over defendant's railroad. Various shipments of hogs are involved. The shipments occurred during a period of two years, 1916 and 1917, and the claims are represented by 71 separate causes of action. The jury returned a general verdict on all causes of action for $802.27, and defendant railroad company appeals.

Plaintiff introduced evidence to show that the hogs were delivered to defendant in good condition and that when received by the consignee at South Omaha 59 hogs were dead and a number crippled. The shipments were made without a caretaker.

Plaintiff relies, for a prima facie case, upon the presumption that all damage to the hogs during shipment was caused by the negligence of the defendant railroad.

Testimony was introduced by defendant to show the damage was from disease and natural causes, for which it would not be liable, and contends that in those instances, where such testimony was introduced, the legal presumption, that the defendant had been negligent and caused the damage, would expire; that such presumption is not and does not take the place of evidence, and that the court should have withdrawn those items from the jury, since, in those instances, there was no issue of fact to be submitted.

Where it appears that live stock, unaccompanied by a caretaker, is received by a railroad company in good condition and
126 delivered later to the consignee in a damaged condition, a prima facie case is made against the railroad company, and the burden is upon it to show that such damage resulted from some cause which would exempt it from liability. Information as to the cause of damage during shipment is peculiarly within the knowledge of the railroad company, and the company is therefore required, as a matter of expediency, to produce the proof of the cause of damage, and to show whether or not the cause is one for which it can or cannot be held responsible. Church v. Chicago, B. & Q. R. Co., 81 Neb. 615; Chicago, B. & Q. R. Co. v. Slattery, 76 Neb. 721; 10 C. J. 379, sec. 581. A railroad company, under our decisions, is an insurer of live stock carried by it, except for such damage as results from the act of God, the public enemy, the fault of the owner or the natural propensities of the animals. In the absence of any evidence, it is presumed that the damage was not the result of any one of those causes. Such presumption, however, is not evidence and is destroyed when actual evidence is introduced of the facts out of which the damage occurred. When evidence of such facts appears and is sufficient to sustain a finding, the presumption expires.

Doctor Everett, a veterinarian, testified, in behalf of the defendant, that he inspected the hogs at destination and that some of the hogs had been killed by smothering, caused by their piling on one another. Other testimony was to the effect that hogs might pile on one another to keep warm in cold weather, or in an endeavor to get fresh air in hot weather, but there was also testimony show-
127 ing that hogs could be made to pile by severe and unusual bumping of the cars. Other veterinarians testified that death from smothering could not be determined from casual inspection. Whether these dead hogs were smothered and, if so, the actual cause of smothering, were questions under the evidence introduced, open to reasonable dispute, and were for the jury. Doctor Everett further testified that certain of the hogs had died from cholera, but his opinion on that matter was disputed by the testimony of other veterinarians who said that cholera could not be detected by such a casual examination as Doctor Everett made. He further testified that certain of the hogs had died from congestion of the lungs, as determined from a post mortem examination. His testimony on that point stands alone, and, since there is evidence to show, without controversy, that those particular hogs died from natural causes, the claims covering them should have been withdrawn from the jury. These are items 6, 48, 58 and 95, upon which claim was made of $163.86.

Doctor Everett again testified that certain of the hogs, which seemed to be crippled, had a disease known as arthritis, and humped up and walked on their toes in a manner peculiar to that disease. There is some dispute in the testimony as to whether arthritis is a rheumatic or tubercular disease, but Doctor Everett's testimony, that the crippling of the hogs was due to this disease, is not controverted. The presumption, then, that the hogs were crippled as a result of

some act of the defendant, would no longer obtain, and the claims upon those hogs should also have been withdrawn. They were items 16, 20, 29, 39, 47, 49, 51, 79 and 85, upon which a
128 total claim of $41.40 was made. It also appears that one hog, claimed to be crippled (item 19), was suffering from a disease and partial paralysis, brought on by such disease. The amount of claim on this item was $3.75. Before the judgment in this case can be allowed to stand, a remittitur should be filed covering the amounts of these claims which should have been withdrawn.

The defendant contends that plaintiff's proof is based upon incompetent evidence. The Union Stock Yards Company, into whose yards the hogs were delivered, keeps a record of the number and condition of the hogs when taken from the cars. This book record was introduced in evidence by the plaintiff, over defendant's objection, to show that the hogs in question were received, some dead and some crippled. The plaintiff's case must stand or fall upon the competency of this proof.

A number of employees of the stock yards company get data for this record. One employee is known as a "car checker." He is supplied with what is called a "chute book." He enters in this book the number of the car opposite each chute, and then turns the book over to the yard master, who goes into the chute and counts the animals unloaded from the car, and enters the result of his count in this book. He also enters the name of the shipper and consignee and point of origin of shipment, which information he hears read by another from the way bills of the railroad company.

Another employee, known as the "cripple checker," carries a
129 book called the "cripple record," and counts and enters in this book the number of crippled animals in each car.

Another employee, known as the "dead hog checker," keeps what is called a "dead stock record." He goes into each car and counts and enters in this book the number of dead animals found and records the number of the car. The "stock yard's record book" is the book which was introduced in evidence, and it contains a complete record of each individual shipment received. It contains the name of the railroad, number of car, name of shipper and consignee, number of animals and number of cripples and deads. The information as to the number of animals in each car and the number of cripples and deads is taken by the office clerk from the so-called "chute book," "cripple record," and "dead stock record," just described. It is a complete compilation made up immediately from the data contained in these memoranda books, with other data, and is the first complete and permanent record of the shipment, based upon the data so collected. The preliminary books mentioned seem to be in the nature of memoranda, gathered for the purpose of making the stock yards record book. These memoranda books are very numerous, since the stock yards company receives several hundred cars of live stock each day. There are a number of sets of employees who keep the memoranda and the books are not identified by the party making them otherwise than by handwriting. Although these books are kept by the company, it is an enormous task to go through

the various books to find the record of each individual car in question, and then to learn from the handwriting what employee
130 made the record. As the superintendent of the stock yards testified, it would have been necessary in this case to have examined an express wagon load or two of these memoranda books in order to sort out the items here involved. This "stock yards record book" is kept in the regular course of business and is the record upon which the transactions with the packing companies purchasing hogs are based. A number of employees, who made the original memoranda books and turned them in to be copied into the "stock yards record book," testified as to the manner of getting the data, identified a number of these books and testified to their correctness. The clerk testified that the stock yards record was made by him and that the entries were true and correct entries of the information furnished him in the manner we have just described. Since this is a first complete record made directly from the data so collected and is kept in the regular course of business, it may be considered a book of original entry. It cannot be said to be incompetent, nor to be hearsay evidence, from the fact that it is made directly from other memoranda, even though that memoranda may have been collected by other employees. Missouri Electric Light & Power Co. v. Carmody, 72 Mo. App. 534; Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 91 S. W. 691; Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692; Cudahy Packing Co. v. Chicago & N. W. R. Co., 201 S. W. (Mo.) 596; Union Pacific Lodge v. Bankers Surety Co., 79 Neb. 801; 22 C. J. 874, sec. 1055, 887, sec. 1077.

The defendant further contends that the record of cripples, as contained in this book, is not evidence of actual crippling, since,
131 so far as the record is concerned, every hog, which does not walk with the herd, is marked a cripple, whether a cripple or whether too slow or too fat to go with the rest. Just what the term "cripple" means on the record is, however, put in controversy by the testimony of a stock yards employee, who says that it is his duty and the duty of other employees to gather all hogs which are on good condition, and too slow and too fat to walk, and to haul them by wagon and deliver them with the herd, and that only actual cripples are left in the pens and, therefore, recorded in the book. There was, then, an issue of fact upon that question.

It is admitted by the pleadings that plaintiff's shipments were all made to the Standard Live Stock Commission Company at South Omaha. It appears from the evidence that the defendant, upon reaching South Omaha, turns its cars over to the Union Stock Yards Company, which handles the cars, pulls them into its unloading stations and there, itself, conducts the unloading and delivery of the animals. The stock yards company acts as terminal carrier for these shipments so long as its duties as a carrier continue. The damage to hogs, complained of, is shown to have existed immediately after unloading and before there was delivery or opportunity to deliver to the consignee, and there is, therefore, no proof that the obligation of the stock yards company as a carrier had at that time terminated.

and that its obligation as a bailee, for which the initial carrier could not be held liable, had commenced. See note, L. R. A. 1918 B 631. (Adams Seed Co. v. Chicago, G. W. R. Co., 181 Ia. 1052.)

132 In this connection, the court based certain instructions upon that portion of section 6058, Rev. St. 1913, which reads as follows: "Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped;" and the jury were told that, though the damage to the hogs might have been sustained during the time that the stock yards company handled them, still the defendant could be held liable for that damage as initial carrier.

The defendant contends that the statute is not operative in this case, since the bill of lading, covering the shipments, in every instance, contained a provision that the "responsibility of this railway company shall cease upon delivery of said property to its connecting line," and that, by virtue of this limitation, the defendant railroad could not be held liable for the default of the stock yards company. Defendant relies upon the holding in Fremont, E. & M. V. R. Co. v. Waters, 50 Neb. 592; Fremont, E. & M. V. R. Co. v. New York C. & St. L. R. Co., 66 Neb. 159; and Whitnack v. Chicago, B. & Q. R. Co., 82 Neb. 464. Those cases are distinguishable from this, for in each of those cases the contract of carriage was over the line of the initial carrier only and was a contract only to deliver to

133 the connecting carrier. It may be further noted that the portion of the statute, in question here, was in none of those cases invoked or referred to.

In the case at bar the contract of carriage was to the Standard Live Stock Commission Company at South Omaha, necessitating the employment of the Union Stock Yards terminal facilities to make delivery at the point of destination, designated in the contract of transportation. It is unnecessary to enter upon the question of whether or not a carrier can, in the face of this statute, limit its contract of carriage to its own line, when the completed transportation contemplated necessitates the employment of a connecting carrier, for that is not the contract in this case. It seems clear to us, however, that where the railroad company does make a contract for through transportation, as was done here, it cannot, at the same time, limit its liability to loss or damage occurring on its own line and relieve itself from the default of its connecting carrier, the obligation for whose default is expressly imposed by the statute. Miller Grain & Elevator Co. v. Union P. R. Co., 138 Mo. 658, 40 S. W. 894; Burtis v. Buffalo & S. L. R. Co., 24 N. Y. 269; Chicago, R. I. & P. R. Co. v. Western Hay & Grain Co., 2 Neb. (Unof.) 784; St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463; see note, 31 L. R. A. n. s. 52 and 53 (Atlantic C. L. R. Co. v. Riverside Mills, 219 U. S. 186.)

Defendant raises the question that this statute is unconstitutional for the reason that it fixes a liability upon an initial carrier for the

default of a connecting carrier; does not furnish to the initial
134 carrier any express right of procuring reimbursement when the loss occurs on the line of the connecting carrier; and hence deprives the initial carrier of its property without due process of law, and denies to it the equal protection of the law, in violation of the 14th amendment to the Constitution of the United States. For such loss, due to the fault of the connecting carrier, the initial carrier, it seems clear, would have the right of reimbursement under the general doctrine of subrogation, though the statute does not expressly so provide. Texas & P. R. Co. v. Eastin & Knox, 100 Tex. 556, 102 S. W. 105; 37 Cyc. 394.

The defendant complains of the court's instruction that "The burden of proof is upon anyone in litigation to establish by a preponderance of the evidence, in maintaining his cause of action or defense, such several allegations as he asserts that are material to such one's success in the action, unless such allegations are admitted by the opposing side." Such an instruction is no aid to a jury, and, in fact, if standing alone and uninterrupted, might be positively misleading. In this case the court proceeded to give other instructions definitely placing the burden of proof, and we do not see that prejudice resulted from the giving of the instruction complained of, nor that in this case it constitutes reversible error.

It is further urged that the court erred in instructing the jury upon the credibility of witnesses by adding a statement that the jury should "consider all the facts shown to exist that will aid you
135 in properly weighing the testimony of each witness. And, in this manner, appealing to your own experience and knowledge of men and of the affairs of mankind, and in your own best judgment, examine, measure and weigh the evidence of each witness, and then give to it such effect as you think it fairly and justly entitled to." The defendant contends that the court thus gave the jury to believe that they might take into consideration their own peculiar experience or observaion regarding either the particular witness or the matters testified about, in addition to or irrespective of the evidence, and thus arrive at a verdict. A fair interpretation of the instruction, however, it seems to us, does no more than advise the jury that they are to consider the witnesses in the light of that knowledge which comes from the common experience of mankind and not their personal knowledge of the character of any of the witnesses, nor of the matters upon which the witness is called to testify. Such general knowledge on the part of the jury and their own observations and experience they are not required to lay aside, when it comes to a matter of determining the credibility of the witnesses who appear before them. 38 Cyc. 1761.

The trial court allowed an attorney's fee of $600 to plaintiff's attorneys, under section 6063, Rev. St. 1913. Defendant contends that this statute is unconstitutional, since it imposes a penalty upon the railroad in favor of an individual. This question is foreclosed by the holdings in Smith v. Chicago, St. P., M. & O. R. Co., 92 Neb. 719; and Marsh & Marsh v. Chicago & N. W. R. Co., 103 Neb. 654, 173

N. W. 679. It is there decided that an allowance of attor-
136 ney's fees is in the nature of a provision for costs and does not amount to a penalty. A provision for costs is intended to furnish reasonable reimbursement to the litigant who is compelled to bring suit and incur expense, caused by the wrong of the losing party. The amount of these fees is left to the discretion of the court, the limitation of the statute being that the amount must be reasonable. So long as the fees are reasonable in amount and not exorbitant, the statute does not operate as a penalty, since it provides only reimbursement of necessary expenses. It was not intended by this statute that the railroad company should pay double damages. An attorney's fee to be reasonable must, under such a statute, not only be based upon a consideration of the value of the attorney's service to the plaintiff, and the amount of time and labor expended by him, but must bear some fair proportion to the amount of the judgment recovered. In this case plaintiff sued for some $3,000. A judgment for $802.27 was obtained, and, in order that the judgment may be allowed to stand, it is necessary that it be cut down by way of remittitur in the amount of $209.01. Though the plaintiff's attorneys have done a considerable amount of work in preparation for the trial of this case, still, under the circumstances disclosed by the record, we must hold that a $600 attorney's fee is more than can reasonably be allowed, and it is ordered that the attorney's fee for plaintiff's attorneys in the trial court be fixed at $200. An attorney's fee of $100 is allowed plaintiff's attorneys for services in this court.

It is further ordered that, should the plaintiff file a remit-
137 titur in the amount of $209.01, within 20 days from the entry hereof, the judgment of the trial court be affirmed; on the other hand, should such remittitur not be filed, that the case be reversed and remanded for further proceedings in accordance with this opinion.

Aldrich, J., not sitting.

138 And afterwards, to wit, on the 5th day of October, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Remittitur, in the words and figures following, to wit:

In the Supreme Court of Nebraska.

No. 21056.

NYE SCHNEIDER FOWLER CO., Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Remittitur.

Comes now the plaintiff and, in accordance with the opinion of the court filed September 27th, 1920, hereby enters a remittitur

of $209.01 upon the judgment entered in plaintiff's favor in the district court.

Dated October 4th, 1920.

COURTRIGHT, SIDNER, LEE & JONES,
Attorneys for Plaintiff.

Endorsed: 21056. Nye Schneider Fowler Co., vs. C. & N. W. Ry. Co., Remittitur. Supreme Court of Nebraska. Filed Oct. 5, 1920. H. C. Lindsay, Clerk. Courtright, Sidner, Lee & Jones, Attorneys, Fremont, Nebraska.

And on the same day, to wit, on the 5th day of October, 1920, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to wit:

139 Supreme Court of Nebraska, September Term, A. D. 1920.

No. 21056.

NYE-SCHNEIDER-FOWLER CO., Appellee,

v.

CHICAGO & N. W. R. CO., Appellant.

Appeal from the District Court of Dodge County.

Oct. 5.

Remittitur in the sum of $209.01, heretofore ordered by this court to be filed, having been filed by appellee, it is by the court ordered that the judgment of the district court of Dodge county as modified by the judgment of this court entered herein on September 27, 1920, be, and the same hereby is, affirmed. It is further ordered that appellant pay all costs incurred herein, taxed at $—, and have and recover of and from appellee the costs so expended; for all of which execution is hereby awarded, and that a mandate issue accordingly.

A. M. MORRISSEY,
Chief Justice.

And afterwards, to wit, on the 15th day of October, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Motion to Retax Costs, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

No. 21056.

NYE SCHNEIDER FOWLER CO., Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Motion to Retax Costs.

Comes now Chicago and North Western Railway Company, Appellant, and moves the court that the costs in this case be retaxed and that all attorneys' fees taxed therein be set aside and cancelled and disallowed for the following reasons:

1.

140 Section 6063 Revised Statutes of Nebraska, 1913, under which attorneys' fees were taxed in the District Court of Dodge County, and were again taxed in the Supreme Court of Nebraska on the ground that the attorneys' fees taxed in the District Court were unreasonable, is unconstitutional and void as depriving Appellant of its property without due process of law and denying to Appellant equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

2.

That the attorneys' fees of One Hundred Dollars ($100) allowed for the services of plaintiff's attorneys in the Supreme Court be set aside and cancelled, and not allowed for the reason that Chapter 134 Laws of Nebraska, 1919, Amending Section 6063 Revised Statutes of Nebraska 1913, is unconstitutional and void because same deprives Appellant of its property without due process of law and denies to Appellant equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

Dated this 13th day of October, A. D. 1920.

WYMER DRESSLER,
R. D. NEELY,
PAUL S. TOPPING,
Attorneys for Appellant.

Endorsed: No. 21056. In the Supreme Court of the State of Nebraska. Nye Schneider Fowler Co. Plaintiff and Appellee vs Chicago and North Western Railway Company, Defendant and Appellant. Motion to Retax Costs. Supreme Court of Nebraska Filed Oct. 15, 1920. H. C. Lindsay, Clerk. Wymer Dressler, Robert D. Neely, Paul S. Topping, Attorneys for Appellant.

And afterwards, to wit, on the 18th day of October, 1920, there was rendered by said court and entered of record upon the
141 journal thereof a certain Judgment, in the words and figures following, to wit:

Supreme Court of Nebraska, September Term, A. D. 1920.

No. 21056.

NYE-SCHNEIDER-FOWLER CO., Appellee,

v.

CHICAGO & N. W. R. CO., Appellant.

Appeal from the District Court of Dodge County.

Oct. 18.

This cause coming on to be heard upon motion of appellant to retax costs herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion to retax costs be, and same hereby is, overruled.

A. M. MORRISSEY,
Chief Justice.

And afterwards, to wit, on the 29th day of October, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Rehearing, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

No. 21056.

NYE-SCHNEIDER-FOWLER CO., Appellee,

vs.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Appellant.

Motion for Rehearing.

Comes now appellant, Chicago and North Western Railway Company, and moves the court that the judgment of affirmance heretofore rendered in this case be vacated and set aside and a rehearing granted, for the following reasons:

I.

The court erred in its holding and opinion with reference to assignment of error number 16 in appellant's brief permitting the
142 record called the "stock yards record book" to be introduced as competent evidence, when same is clearly shown not to be an original record, because such rule will permit a plaintiff

to use secondary evidence and thereby deny the defendant the right of cross-examination of the witness who made the original records from which such secondary evidence is compiled, thus in effect placing upon a defendant in every such case the burden of proof, contrary to statutes and contrary to all rules of general law.

II.

The court erred in taxing an attorneys' fee in favor of plaintiff, for the reason that Section 6063, Revised Statutes of Nebraska, 1913, as amended by Chapter 134, Laws of Nebraska, 1919, is unconstitutional and void, because same deprives defendant of its property without due process of law and denies to the defendant equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

III.

Said Attorneys' Fee Statute, being Section 6063, Revised Statutes of Nebraska, 1913, as amended by Chapter 134, Laws of Nebraska, 1919 is unconstitutional and void, because same constitutes an arbitrary and unreasonable exercise of power by the legislature.

IV.

Said Statute being Section 6063, Revised Statutes of Nebraska, 1913, as amended by Chapter 134, Laws of Nebraska, 1919, as unconstitutional and void and in violation of the Interstate Commerce Act, because same constitutes an unlawful burden upon and regulation of interstate commerce.

V.

The court erred in holding and deciding that Section 6058 Revised Statutes Nebraska 1913 does not violate the Fourteenth Amendment to the Constitution of the United States, nor deprive appellant of its property without due process of law, nor deny to appellant equal protection of the law.

143 VI.

The court erred in attempting to construe said statute so as to make it valid by permitting subrogation for liability thereunder when the statute does not contain any language to indicate such legislative intent.

WYMER DRESSLER,
ROBERT D. NEELY,
PAUL S. TOPPING,
Attorneys for Appellant.

Endorsed: 21,056. In the Supreme Court of the State of Nebraska, Nye-Schneider-Fowler Company, Appellee, vs. Chicago and

North Western Railway Company, Appellant. Motion for Rehearing. Supreme Court of Nebraska. Filed Oct. 29, 1920. H. C. Lindsay, Clerk.

And afterwards, to wit, on the 10th day of November, 1920, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to wit:

Supreme Court of Nebraska, September Term, A. D. 1920.

No. 21056.

NYE-SCHNEIDER-FOWLER CO., Appellee,

v.

CHICAGO & N. W. R. CO., Appellant.

Appeal from the District Court of Dodge County.

Nov. 10.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and same hereby is, overruled and a rehearing herein denied.

A. M. MORRISSEY,
Chief Justice.

144 And afterwards, to wit, on the 12th day of November, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Withholding of Mandate and to Fix Supersedeas Bond, in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

No. 21056.

NYE SCHNEIDER FOWLER CO., Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Motion.

Comes now the Appellant after the court has overruled its motion for rehearing and states to the court that Appellant expects to apply to the Supreme Court of the United States for a writ of error to further review the record in this case by that court, and for that purpose

Appellant moves the court that no mandate be issued to the District Court of Dodge County in this case, but that the court will fix the amount of a Supersedeas Bond for Appellant to file pending the final determination of said cause in the Supreme Court of the United States.

WYMER DRESSLER,
ROBERT D. NEELY,
PAUL S. TOPPING,
Attorneys for Appellant.

Endorsed: No. 21056. In the Supreme Court of the State of Nebraska. Nye Schneider Fowler Co., Plaintiff and Appellee, vs. Chicago and North Western Railway Company, Defendant and Appellant. Motion. Supreme Court of Nebraska. Filed Nov. 12, 1920. H. C. Lindsay, Clerk. Wymer Dressler, Robert D. Neely, Paul S. Topping, Attorneys for Defendant & Appellant.

And afterwards, to wit, on the 15th day of November, 1920, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to wit:

145 Supreme Court of Nebraska, September Term, A. D. 1920.

No. 21056.

NYE SCHNEIDER FOWLER CO., Appellee,

v.

CHICAGO & N. W. R. Co., Appellant.

Appeal from the District Court of Dodge County.

Nov. 15.

This cause coming on to be heard upon motion of appellant for a stay of the issuance of mandate, and for an order fixing supersedeas bond herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and hereby is, sustained; that the issuance of mandate be, and hereby is, stayed until the further order of this court, and supersedeas bond herein is fixed at $2,500.00.

A. M. MORRISSEY,
Chief Justice.

146 And afterwards, to wit, on the 30th day of November, 1920, there was filed in the office of the Clerk of said Supreme Court by the plaintiff in error, Chicago & Northwestern Railway Company, a supersedeas Bond, which said bond was on said day duly approved by Hon. Charles B. Letton, Acting Chief Justice of said Supreme Court; that the following is a true and correct copy of said superse-

deas bond, together with the allowance thereof by the Acting Chief Justice as aforesaid.

In the Supreme Court of the State of Nebraska.

No. 21056.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error.

vs.

NYE SCHNEIDER FOWLER CO., Defendant in Error.

Supersedeas Bond on Writ of Error.

Know all men by these presents: That the Chicago & North Western Railway Company, as Principal, and The National Surety Company, a Corporation organized under the laws of the State of New York, and duly authorized to transact the business of writing surety bonds in the State of Nebraska, as Surety, are held and firmly bound unto Nye Schneider Fowler Co., in the sum of Twenty-five Hundred Dolalrs ($2,500.00), well and truly to be paid to Nye Schneider Fowler Co., defendant in error, its successors and assigns, to the payment of which, well and truly to be made, we bind ourselves and our assigns jointly and severally firmly by these presents.

Sealed with our seals and dated the 30th day of November, in the year 1920.

Whereas the above named Chicago & North Western Railway Company, plaintiff in error, has prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the Supreme Court of the State of Nebraska in the above entitled action,

Now, therefore, the conditions of this obligation are such that if the Chicago & North Western Railway Company shall prose-
147 cute its Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
By WYMER DRESSLER,
Its Attorney of Record in Such Case.
NATIONAL SURETY COMPANY,
By WM. H. WHEELER,
Its Attorney in Fact. [SEAL.]

The above and foregoing Bond is hereby approved, and it is ordered that same operate as a Supersedeas.

CHAS. B. LETTON,
Acting Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: No. 21056. In the Supreme Court of the State of Nebraska. Chicago and North Western Railway Company, Plaintiff in Error, vs. Nye Schneider Fowler Co., Defendant in Error. Supersedeas Bond on Writ of Error. Supreme Court of Nebraska. Filed Nov. 30, 1920. H. C. Lindsay, Clerk.

148 And on the same day, to wit, the 30th day of November, 1920, there was filed in the office of the Clerk of said Supreme Court by the said Chicago & North Western Railway Company, a Petition for Writ of Error, and on the said 30th day of November, 1920, said petition for writ of error was duly allowed by Hon. Charles B. Letton, Acting Chief Justice of said Supreme Court, which said original petition, together with the allowance of the writ of error endorsed thereon by said Acting Chief Justice, marked Exhibit "A", is attached hereto and forms a part hereof:

149 EXHIBIT A. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

No. 21056.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

NYE SCHNEIDER FOWLER CO., Defendant in Error.

Petition for Writ of Error.

To the Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska:

Comes now the above named Plaintiff in Error and complains that in the judgment, decision, record and proceedings in a certain cause pending in the Supreme Court of the State of Nebraska, in which the above named Plaintiff in Error was Appellant, and Nye Schneider Fowler Co., was Appellee, which cause was decided and determined in the said Supreme Court of the State of Nebraska and judgment of affirmance therein rendered on the 5th day of October, 1920, and in which a Motion for Rehearing in said cause was thereafter filed as provided by law and overruled on the 10th day of November, 1920, at which time the said judgment of said Court became final, which said Supreme Court of the State of Nebraska was the highest Court of Law or Equity in which a decision or judgment could be had in said action, and in which action and the judgment and decision therein there was involved the question whether or not

150 Section 6063, Revised Statutes of Nebraska 1913, as amended by Chapter 134 Laws of Nebraska 1919, is in conflict with the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of his

property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law; and the question whether or not Section 6058, Revised Statutes of Nebraska 1913, violates the Fourteenth Amendment to the Constitution of the United States, which requires that no State shall deprive any person of his property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law, and the decision of the Supreme Court of Nebraska in each instance was in favor of the validity of said Statutes.

In said action defendant in Error claimed the right to recover and collect from Plaintiff in Error a reasonable attorneys' fee in pursuance of Section 6063, Revised Statutes 1913, and the District Court of Dodge County, Nebraska, allowed to Defendant in Error the sum of $600.00 as attorneys' fees recoverable under said Statute; and Defendant in Error claimed in the Supreme Court of Nebraska the right to recover additional attorneys' fees, by virtue of Chapter 134, Laws of Nebraska 1919, and the Supreme Court of Nebraska allowed to Defendant in Error the sum of $100.00 attorneys' fees alleged to be earned by Defendant in Error in the Supreme Court of Nebraska in said cause; and although the Supreme Court of Nebraska reduced the amount of the attorneys' fees recovered by Defendant in Error in the District Court of Dodge County from $600.00 to $[illegible], Plaintiff in Error contends that said Statutes and each of them were and are null and void, because they deprive Plaintiff in
151 Error of his property without due process of law, and deny to Plaintiff in Error equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and the Supreme Court of Nebraska has denied said contentions and held in favor of the validity of said Statutes.

In said action Defendant in Error claimed both in the District Court of Dodge County and in the Supreme Court of Nebraska, that Plaintiff in Error as initial carrier of the shipments of livestock involved, was liable by virtue of the provisions of Section 6058, Revised Statutes of Nebraska 1913, for all damages to said shipment both on its own line and on the lines of connecting carriers, in this instance the Union Stock Yards Company of Omaha, Limited; while Plaintiff in Error claimed that said Statute should not be so construed as to make Plaintiff in Error so liable for damages arising on the line of a connecting carrier, but that if said Statute should be so construed same is null and void as depriving Plaintiff in Error of its property without due process of law and denying to Plaintiff in Error equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; but the Supreme Court of Nebraska has denied said contentions of Plaintiff in Error and holds in favor of the validity of said Statute and construes the same to render Plaintiff in Error liable for damages arising on the lines of connecting carriers; and Plaintiff in Error alleges that manifest error happened in said action as appears from said judgment and decision and the record, and in the Assignment of Errors herewith presented, to the great damage of the Plaintiff in Error.

152 Wherefore, the said Plaintiff in Error prays the allowance of a Writ of Error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States for its reversion and correction thereof, and for Citation and Supersedeas thereon, and your petitioner will ever pray.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
By WYMER DRESSLER,
ROBERT D. NEELY,
PAUL S. TOPPING,
Its Attorneys.

The foregoing Petition for Writ of Error and Assignments of Error filed herewith being presented this 30th day of November, 1920, upon due consideration whereof it is ordered that Writ of Error as prayed be allowed and that Citation be directed to Nye Schneider Fowler Co., Defendant in Error herein, for its due presence in the Supreme Court of the United States, and that Bond on said Writ of Error be given in the sum of Twenty-five Hundred Dollars ($2,500.00), and when filed same shall operate as a Supersedeas.

CHAS. B. LETTON,
Acting Chief Justice Supreme Court of the State of Nebraska.

153 [Endorsed:] No. 21056. In the Supreme Court of the State of Nebraska. Chicago and North Western Railway Company, plaintiff in error, vs. Nye Schneider Fowler Co., defendant in error. Petition for writ of error. Supreme Court of Nebraska. Filed Nov. 30, 1920. H. C. Lindsay, clerk.

154 And on the same day, to wit, the 30th day of November, 1920, there was filed in the office of the Clerk of said Supreme Court by the Chicago & North Western Railway Company, certain Assignments of Error, the said original assignments of error so filed marked Exhibit "B", is attached hereto and forms a part hereof:

155 EXHIBIT B. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

No. 21,056.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

NYE SCHNEIDER FOWLER CO., Defendant in Error.

Assignment of Errors.

Comes now the Plaintiff in Error, the Chicago and North Western Railway Company, and respectfully submits that in the record, pro-

ceedings, decision and final judgment of the Supreme Court of the State of Nebraska in the above entitled cause there is manifest error in this, to-wit:

Assignment of Errors.

I.

The Supreme Court of the State of Nebraska erred in affirming the judgment of the District Court of Nebraska within and for the County of Dodge.

II.

The Supreme Court of the State of Nebraska erred in holding and deciding that Section 6063, Revised Statutes of Nebraska 1913, as amended by Chapter 134 Laws of Nebraska 1919, is not unconstitutional and void as being in violation of the Fourteenth Amendment to the Constitution of the United States, and that same does not deprive Plaintiff in Error of its property without due process
156 of law nor deny to plaintiff in error equal protection of the law in violation of said Fourteenth Amendment to the Constitution of the United States.

III.

The Supreme Court of the State of Nebraska erred in holding and deciding that Section 6058, Revised Statutes of Nebraska 1913, does not deny to Plaintiff in Error equal protection of the law nor deprive Plaintiff in Error of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

IV.

The Supreme Court of the State of Nebraska erred in holding and deciding that the initial carrier of a shipment of livestock wholly within the State of Nebraska, who is held liable for all damages during the entire transportation, including damages occurring on the lines of connecting carriers, has the right to reimburse itself from the connecting carrier committing the injury under the general principle of subrogation, thereby rendering Section 6058, Revised Statutes of Nebraska 1913 not unconstitutional as depriving the initial carrier of its property without due process of law, nor denying to the initial carrier equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

V.

The Supreme Court of the State of Nebraska erred in holding and deciding in this case that a book record kept by the Stock Yards

Company of South Omaha, Nebraska, in the usual course of
157 business, which the evidence shows was not a book of original entry but a mere compilation from other books of original entry, namely, the "dead hog record and the "crippled hog record," which latter books are in existence and the parties who made such original entries are available as witnesses, is competent evidence in a suit against the carrier for damages on account of dead and crippled hogs alleged to have been injured in transit, without the production of said original records or explanation for their non-production.

Wherefore, Plaintiff in Error prays that the judgment of the Supreme Court of the State of Nebraska be reversed, and that judgment be rendered herein in favor of Plaintiff in Error and for costs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff in Error.
By WYMER DRESSLER,
ROBERT D. NEELY,
PAUL S. TOPPING,
Its Attorneys.

158 [Endorsed:] No. 21056. In the Supreme Court of the State of Nebraska. Chicago and North Western Railway Company, Plaintiff in Error, vs. Nye Schneider Fowler Co., Defendant in Error. Assignment of Errors. Supreme Court of Nebraska. Filed Nov. 30, 1920. H. C. Lindsay, clerk.

159 And on the same day, to wit, on the 30th day of November, 1920, there was issued out of said Supreme Court of Nebraska a certain Citation, which said original citation as issued, marked Exhibit "C", together with proof of service of the same endorsed thereon, is attached hereto and made a part hereof:

160 EXHIBIT C. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

No. 21056.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

NYE SCHNEIDER FOWLER CO., Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Nye Schneider Fowler Co., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days of the date hereof pursuant to Writ of Error filed in the Clerk's Office of the Supreme Court of the State of Nebraska, wherein the Chicago and North Western Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Andrew M. Morrissey, Chief Justice of the Supreme Court of Nebraska this 30th day of November, 1920.

CHAS. B. LETTON,
Acting Chief Justice of the Supreme Court of the State of Nebraska.

Service of the within and foregoing Citation and the receipt and copy thereof are hereby accepted and acknowledged this 30th day of November, 1920.

COURTRIGHT, SIDNER, LEE & JONES,
Attorneys for Nye Schneider Fowler Co., Defendant in Error.

161 [Endorsed:] No. 21056. In the Supreme Court of the State of Nebraska. Chicago and North Western Railway Company, Plaintiff in Error, vs. Nye Schneider Fowler Co., Defendant in Error. Citation. Supreme Court of Nebraska. Filed Nov. 30, 1920. H. C. Lindsay, Clerk.

162 And on the same day, to wit, the 30th day of November, 1920, there was issued by the District Court of the United States of the District of Nebraska in said case, a Writ of Error, which said original writ of error marked Exhibit "D", together with the allowance thereof by Hon. Charles B. Letton, Acting Chief Justice of the Supreme Court of Nebraska endorsed thereon, is attached hereto and forms a part hereof:

163 EXHIBIT D. H. C. Lindsay, Clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a certain plea which is in the said Supreme Court of the State of Nebraska, before you or some of you, being the highest Court of Law or Equity of said State in which a decision could be had in the said suit between the Chicago and North Western Railway Company, Defendant, and Plaintiff in Error, and Nye Schneider Fowler Co., Plaintiff, and Defendant in Error, wherein was drawn in question the validity of Section 6063, Revised Statutes of Nebraska 1913, as amended by Chapter 134, Laws of Nebraska 1919, and Section 6058, Revised Statutes of Nebraska 1913, under which said Statutes the said Nye Schneider Fowler Co., claimed the right to recover attorneys' fees from the said Chicago and North Western Railway Company in connection with a recovery for damages to livestock in transit; and said Nye Schneider Fowler Co. claimed the right to recover against Chicago and North Western Railway Company for all damages occurring on the lines of connecting carriers under authority of said Section 6058, Revised Statutes of Nebraska 1913; and Chicago and North Western Railway Company claimed that each and all of said Statutes are null and void because they deprive Plaintiff in Error of its property without

164 due process of law, and deny to Plaintiff in Error equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and the decision of the said Supreme Court of the State of Nebraska was in favor of the validity of said Statutes, and manifest error hath happened, to the great damage of the said Chicago and North Western Railway Company, Plaintiff in Error, as by its Complaint and Assignments of Error appears.

We being willing that error, if any hath happened should be duly corrected, and full and speedy justice done to the party aforesaid, in its behalf do command you that such judgment be therein given that then under your seal distinctly and openly you send the

record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States together with this Writ so that you may have same at Washington on the 30 day of December next in the said Supreme Court of the United States; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court on the 30 day of November, 1920.

[Seal of United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT,
Clerk of the District Court of the United States for the District of Nebraska.
By J. H. McCLAY,
Deputy.

Allowed Nov. 30, 1920.
CHAS. B. LETTON,
Acting Chief Justice.

165 [Endorsed:] No. 21056. Writ of Error.

166 And on the same day, to wit, the 30th day of November, 1920, there was filed in the office of the Clerk of said Supreme Court a certain Præcipe for this record, which said original præcipe with acceptance of service of the same endorsed thereon marked Exhibit "E", is attached hereto and forms a part hereof:

167 EXHIBIT E. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

No. 21056.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

NYE SCHNEIDER FOWLER CO., Defendant in Error.

Præcipe.

The Clerk of said Court will please prepare a transcript of the record in the above entitled case for return of writ of error to the Supreme Court of the United States including therein the following:

1. Petition for writ of error.

2. Assignments of error and prayer for reversal.

3. Order allowing writ of error.

4. Writ of error.

5. Citation.

6. Supersedeas bond on writ of error.

7. Transcript filed in Supreme Court of Nebraska, including:

Plaintiff's petition.
Defendant's answer.
Plaintiff's reply.
Journal entries of trial.
Instructions given by the trial court.
Instructions requested by defendant, Railway Company and refused.
Verdict of the jury.
Judgment of the District Court.
Motion for new trial.
168 Motion for taxation of attorney's fees as costs.
Objections of defendant (Railway Company) to taxation of attorney's fees.
Order allowing attorney's fees in District Court.
Notice of Appeal.
Supersedeas bond given in District Court.
Motion of plaintiff in Supreme Court for taxation of attorney's fees.
Objections of defendant in Supreme Court to taxation of attorney's fees.
Judgment of affirmance in Supreme Court.
Remittitur filed by Appellee.
Motion for rehearing in Supreme Court.
Motion to retax the costs in Supreme Court eliminating attorney's fees.
Ruling on said motion.
Order of Supreme Court denying rehearing.
Motion for stay of Mandate.
Order of Supreme Court on said motion.

8. The following portions of the Bill of Exceptions:

Proceedings on motion for new trial and taxation of attorney's fees, commencing at page 598, red ink figures, to end of Bill of Exceptions.

Deposition of L. G. Laidlaw, commencing at page 406, red ink figures center of page bottom, to an- including page 426, being questions 1033 to 1084, inclusive. Deposition of J. S. Walters at pp 431 red ink to 467 inclusive.

9. Assignment of errors on behalf of Appellant in Supreme Court of Nebraska as shown on following pages of Appellant's brief:

Assignment 1, Page 14.

Assignment 6, including the instruction, Pp. 33.
169 Assignment 7 including the instruction, pp. 33 and 34.
Assignment 15, including the instruction, page 38.

Assignment 16 page 38.
Assignment 17 page 48.

Dated this 20th day of November, 1920.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
By WYMER DRESSLER,
ROBERT D. NEELY,
PAUL S. TOPPING,
Its Attorneys.

Due and legal service of the foregoing Praecipe is hereby accepted and receipt of copy thereof is hereby acknowledged this 20 day of Nov. 1920, and same calls for all of the record necessary to determine questions involved.

NYE SCHNEIDER FOWLER CO.,
Defendant in Error.
By COURTRIGHT, SIDNER, LEE & JONES,
Its Attorneys.

170 [Endorsed.] No. 21,056. In the Supreme Court of the State of Nebraska. Chicago and North Western Railway Company, Plaintiff in Error, vs. Nye Schneider Fowler Co., Defendant in Error. Praecipe. Supreme Court of Nebraska. Filed Nov. 30, 1920. H. C. Lindsay, Clerk.

171 STATE OF NEBRASKA, *ss:*

Supreme Court.

Certificate of Lodgment.

I, H. C. Lindsay, Clerk of the said Court, do hereby certify, that there was lodged with me as such Clerk on the 30 day of November, 1920, in the matter of Chicago and North Western Railway Company, Plaintiff in Error, vs. Nye Schneider Fowler Co., Defendant in Error:

1. The original bond of which a copy is herein set forth.

2. Two copies of the Writ of Error as herein set forth.—one for the defendant and one to file in my office.

3. Two copies of the Assignments of Error, as herein set forth,—one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Lincoln, Nebraska, this 24 day of December, 1920.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of Supreme Court of Nebraska.

172 [Endorsed:] No. 21056. Certificate of Lodgment.

173 *Authentication of Record.*

STATE OF NEBRASKA, *ss:*

Supreme Court.

I, H. C. Lindsay, Clerk of said Court, do hereby certify that the foregoing pages numbered *a*-1 to 172, inclusive, are a full, true and complete transcript of all that part of the record and proceedings in the case of Nye-Schneider-Fowler Company, appellee, v. Chicago & North Western Railway Company, Appellant, No. 21056, as called for and requested in the præcipe filed in my office and accompanying this record, and also of the opinion of the court rendered therein as the same now appear on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Lincoln, Nebraska, this 24th day of December, 1920.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

174 *Return to Writ.*

UNITED STATES OF AMERICA, *ss:*

Supreme Court of Nebraska.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of that part of the record and proceedings in said cause in our court as called for and requested in the præcipe filed in my office on November 30, 1920, and which said præcipe is made a part of this record.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Nebraska, at Lincoln this 24th day of December, 1920.

[Seal of Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska.

Fees for This Record.

172 pp. @ 30¢	$51.60
3 certificates	1.50
Express	.75
	$53.85

Paid by C. & N. W. R. Co.
12/24/20.

H. C. LINDSAY,
Clerk.

Endorsed on cover: File No. 28,037. Nebraska Supreme Court. Term No. 680. Chicago & Northwestern Railway Company, plaintiff in error, vs. Nye Schneider Fowler Co. Filed January 13, 1921. File No. 28,037.

Supreme Court of the United States, October Term, 1921.

No. 199.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

NYE SCHNEIDER FOWLER CO., Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the attached transcript from the Supreme Court of Nebraska contains the live stock contract referred to in paragraph G of the plaintiff's petition shown at page 3 of the Transcript of Record in this case, and that such additional transcript may be printed and consolidated with and become a part of the original printed Transcript of Record in this cause with like force and effect as through contained originally therein; its omission being due to an error on the part of the Clerk of the Supreme Court of Nebraska in making his return to the Writ of Error in this cause.

WYMER DRESSLER,
Counsel for Plaintiff in Error.
GARARD GLENN,
Counsel for Defendant in Error.

Form 37. 30M 5-11-16.

Read This Contract.

Chicago & North Western Railway Company.

Live Stock Contract.

Rates on Live Stock vary according to the valuations stated by shipper, and as this Company has no means of determining the values of Live Stock tendered for transportation, shippers will be required to declare in writing the valuation at the time and place of shipment. Where shippers refuse to declare valuation and execute Live Stock contract, Live Stock will not be accepted for transportation.

For the purpose of enabling the C. & N. W. Ry. to apply the lawful rate as provided in its tariffs, the shipper declares said animals to be of the value as follows, to wit:

Each Horse or Pony (Gelding, Mare or Stallion), Mule, Jack or Jenny	$....
Each Colt, under 1 year	....
Each Ox, Bull or Steer	....
Each Cow or Burro	....
Each Calf	....
Each Hog	....
Each Sheep or Goat	....

The Chicago & North Western Railway Company is not a common carrier of Live Stock of valuation greater than $800.00 per head and will not accept shipments for transportation where the declared valuation is in excess of $800.00 per head.

Shipments of Live Stock in Carloads, or less than carloads, will only be taken at the rates named herein, after this contract or agreement shall have been signed by the Company's Station Agent, and the owner or shipper.

Different kinds of Live Stock must not be loaded together in the same car (except as provided for in the tariffs or by special instructions).

Agents are not authorized to agree to transport Live Stock by any particular train or in time for any particular market or otherwise than with reasonable dispatch.

The said shipper shall not be entitled to free transportation for himself or his employes by virtue of this contract, except in accordance with the rules issued by general freight department, all of which rules and regulations are made part of this contract and are agreed to by shipper.

The person or persons in charge of the Live Stock covered by this contract, shall ride and remain in the caboose attached to the train while the same is in motion, or about to be put in motion, and whenever such person or persons shall leave the Caboose or pass upon or over the cars while the train is in motion, or about to be put in motion, or shall unnecessarily walk along the track, they do so at their own risk of injury, and the Chicago & North Western Railway Company shall not be liable therefor. The Chicago & North Western Railway shall not be required to start or stop its trains or caboose cars from depots or platforms, or to furnish lights for the accommodation of such persons. These provisions shall extend to and be binding upon any person or persons in charge of any such Live Stock, as agents or employes of the shippers or owners.

Persons in charge of live stock are prohibited from getting on or off cars or walking over them while they are in motion.

Agents will permit only the signatures of owners or bonafide employes, who accompany the stock, to be entered on back of contract without regard to Passes allowed by number of Cars, and run a pen through remaining lines.

Women or other persons incompetent to take charge of shipments of live stock will not be passed.

Such Entry of Persons in charge, and certificate of Billing Agent to that effect, with proper notation on way-bill, will be the authority for Conductors to pass them with Carload Shipments of the Stock.

All persons are thus passed only at their own risk of personal injury from whatever cause.

Notice to Conductors.

This contract is not good under any conditions, for transportation on the passenger trains of this company in the same direction the stock is moving. It is only good on passenger trains for return

transportation when the conditions of the contract are complied with, and the contract has been duly certified to by the authorized agent of the company.

MARVIN HUGHITT, JR.,
Freight Traffic Manager.

Nos. of way-bills.	Nos. of cars.	No. of animals in each car, shipper's count.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Freight Office, Chicago & North Western R'y Co.

—— Station, —— —, 191-, hour — —— Received of —— -—— to be delivered —— to —— —— at —— Station, at the following rates:

— per for Horses or Mules.
— " for Cattle or Calves.
— " for Hogs.
— " for Sheep or Goats.

In consideration of which, and for other valuable consideration, it is hereby agreed that said Railroad Company shall not be liable for loss of Live Stock by jumping from the cars, delay of trains not caused by negligence, or any damage said property may sustain, except such as may result from a collision of the train with other trains, or when the cars are thrown from the tracks in course of transportation, and in this case, the Railroad Company, upon whose road the accident, loss or damage shall occur, shall alone be liable therefor, and no suit shall be brought, or claim made, against any other Company forming a part of the route, for such loss or damage (it being expressly understood and agreed that the responsibility of this Railway Company shall cease upon delivery of said property to its connecting line, unless otherwise agreed to in writing, and signed by the respective parties hereto), and that the rules and regulations printed above are an essential part of this contract.

It is further agreed between the owner and the shipper and the Chicago & North Western Railway Company, that such owner and shipper shall assume all risk and expense of feeding, watering, bedding and otherwise caring for the Live Stock covered by this contract, while in cars, yards, pens or elsewhere, and shall load and unload the same at his expense and risk. The liability of the Railway Company shall not attach until the Live Stock has been loaded

into the car or cars by the owner or shipper and a written contract for same has been issued.

CHICAGO & NORTH WESTERN
RAILWAY CO.,

By —— ——,
Agent.

—— ——,
Owner and Shipper.

Reverse Side of Contract.

Chicago & North Western Railway Co.

Stock Contract.

Nos. of Cars .....
Nos. .....
The owners or bona-fide employes of owners actually in charge of, and who will accompany the within described Stock, are required to write their own names in ink here.

.....

.....

.....

The men actually in charge have written their own names above.

.....Forwarding Agent.
..... Station.

NOTE.—Agents will permit the Owners or bona-fide Employes only (who actually accompany the Stock) to sign on back of this Contract.

When the proper names have been signed, Agent will run a pen through remaining lines.

I hereby sign my name as a means of identifying myself as the shipper and original signer of this Contract.

.....

.....

.....

When a drover is to be returned free, then this contract will be good for return passage (under conditions named in tariffs published by the General Freight Department), when duly signed and stamped by Receiving Agent.

[STAMP.]

—— ——,
Receiving Agent.

Instructions to Agents.

Agents will in every case call attention to and fully explain to Shippers and men in charge the present rules regulating Drovers' Return Tickets. All return stock transportation to be issued at Chicago must be procured at the Union Stock Yards.

At all other stations where shippers are entitled to return transportation under the rules provided for in GFD Nos. 5736-K and 11105-H, subsequent issues or amendments, this contract will be used for return transportation after being stamped and signed by the agent in the blank space provided therefor.

All Live Stock Contracts shall be executed in duplicate and both copies signed in ink by both agent and shipper. One copy shall be delivered to the shipper and one retained by the agent as a station record.

The blank spaces for values must be filled out by the shipper himself.

Agents are prohibited from issuing tickets to attendants of Live Stock, the only form of transportation allowable being the Live Stock contract properly filled out and signed on the back in the space provided.

A Live Stock contract must be properly executed whenever Live Stock is received for shipment, whether in carloads or less than carloads. Only one contract should be issued to the same shipper for any number of cars to one consignee shipped by the same train to the same destination.

Agents are prohibited from way-billing Live Stock "To order." Freight Conductors must fill in blanks below:

This is to certify that attendant accompanied Live Stock.

From ———— to ———— train No. —— date ————
Station Number Station Number
Conductor —— ——.

From ———— to ———— train No. —— date ————
Station Number Station Number
Conductor —— ——.

From ———— to ———— train No. —— date ————
Station Number Station Number
Conductor —— ——.

From ———— to ———— train No. —— date ————
Station Number Station Number
Conductor —— ——.

Important to Shippers.

Party in charge of shipment must see that this contract is presented to and endorsed by each train conductor as the issuance of return transportation is dependent on such endorsement.

Agent must in every case punch description before allowing Contract to leave his office.

Description of Man in Charge.

Size.

Slim	0
Medium	0
Stout	0

Height.

Tall	0
Medium	0
Short	0

Hair.

Light	0
Gray	0
Dark	0
Red	0

Beard.

Mustache	0
Chin	0
Side	0
Full Beard	0
None	0

Agent must in every case punch description before allowing Contract to leave his office.

Description of Man in Charge.

Size.

Slim	0
Medium	0
Stout	0

Height.

Tall	0
Medium	0
Short	0

Hair.

Light	0
Gray	0
Dark	0
Red	0

Beard.

Mustache	0
Chin	0
Side	0
Full Beard	0
None	0

STATE OF NEBRASKA,
Lancaster County, ss:

I, H. C. Lindsay, Clerk of the Supreme Court within and for the said State and custodian of the files and records thereof, do hereby certify that the foregoing is a true and correct copy of the printed "live stock contract" attached to the petition in the case of Nye-Schneider-Fowler Company v. Chicago & Northwestern Railway Company, No. 21056, as the same appears at page 12 of the transcript in said case on file in my office, which transcript constitutes a part of the record in said case.

In witness whereof, I have hereunto set my hand and officially affixed the seal of said court at Lincoln, this 8th day of March, 1922.

[Seal of the Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk.

[Endorsed:] File No. 28,037. Supreme Court U. S., October Term, 1921. Term No. 199. C. & N. W. Ry. Co., P. E., vs. Nye-Schneider-Fowler Co. Stipulation and Addition to Record. Filed Mar. 24, 1922.

IN THE

Supreme Court of the United

OCTOBER TERM, 19[illegible]

Number [illegible] 24

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

NYE-SCHNEIDER-FOWLER CO.,

Defendant in Error.

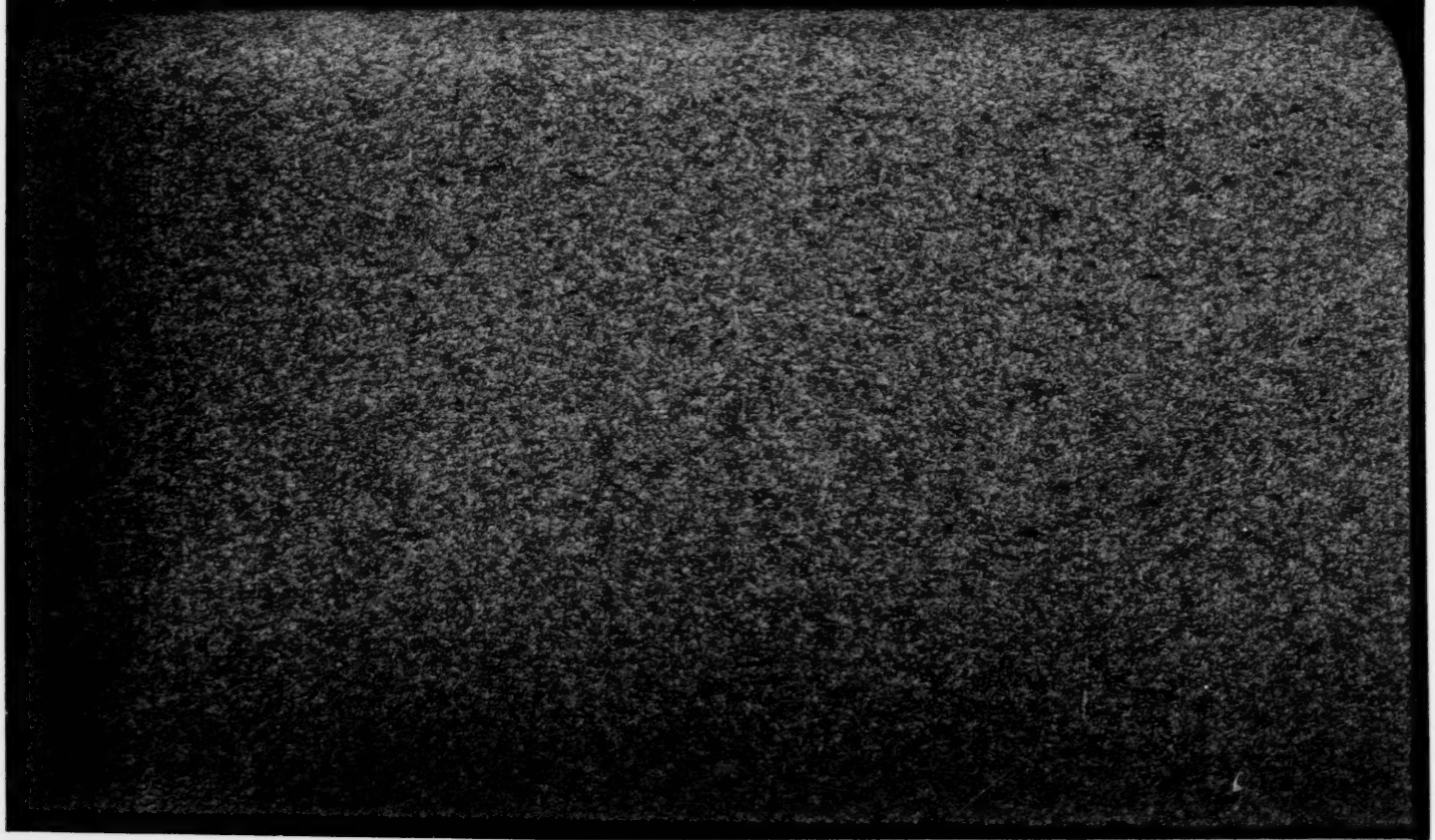
IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF PLAINTIFF IN ERROR.

WINSLOW DENNISON,
Counsel for Plaintiff in Error.

F. W. STEVENS, Chicago, Illinois.
F. P. LUTHER, JR., Washington, D. C.
Of Counsel.

OMAHA LAW PRINTING COMPANY



INDEX

Page

Statement of the Case 1- 5

First Specification of Error..... 5

Section 6058 Revised Statutes Nebr. 1913 quoted..... 5

Second Specification of Error..... 9

Section 6063 Revised Statutes Nebr. 1913 quoted..... 9-10
Same section as amended quoted..... 11

Brief of Argument.....14-15

Argument commences 16

LIST OF CASES CITED

C., M. & St. P. Ry. vs. Kennedy, 232 U. S. 626..... 15
C., M. & St. P. Ry. vs. Polt, 232 U. S. 165.....15, 28
F., E. & M. V. R. R. Co. vs. N. Y. C. & St. L. Ry., 66 Neb. 159..... 17
F., E. & M. V. R. R. Co. vs. Walters, 50 Neb. 592..... 17
Gulf Colorado & Santa Fe R. R. vs. Ellis, 165 U. S. 150.....15, 24
1 L. R. A. page 641 (note)..... 14
13 L. R. A. page 619 (note)..... 14
Marsh & Marsh vs. C. & N. W. Ry. Co., 103 Neb. 654..... 16
Meeker vs. Larson, 65 Neb. 158..... 14
Memphis, etc., R. R. vs. Dow, 120 U. S. 287, 301, 302.....14, 19
M., K. & T. Ry. vs. Cade, 233 U. S. 642.....15, 29
Myrick vs. Michigan Central Railroad Co., 107 U. S. 102..... 18
Northern Trust Company vs. Consolidated Elevator Co., 4 A. L. R. 510, 515, 516 14
Pomeroy's Equity Jurisprudence, 3rd ed. Vol. 4, Sec. 1419 and note.... 14
Seaboard Airline Ry. vs. Seegers, 207 U. S. 73.....15, 29
Smith vs. C., St. P., M. & O. Ry. Co., 99 Neb. 719..... 16
St. Louis, Iron Mountain & Southern Ry. vs. Wynne, 224 U. S. 354.....15, 27
Truax, et al vs. Corrigan, et al, 42 Sup. Ct. 124.....15, 20, 30
Union Terminal Co. et al vs. Turner Construction Co., 247 Fed. 727..... 15
Wagner vs. Union Stock Yards Co., et al, Sup. Ct. Nebr. Case No. 21698, decided February 16, 1922 16
Whitnack vs. C., B. & Q. R. R. Co., 82 Neb. 464..... 17
Yazoo & M. V. R. R. Co. vs. Jackson Vinegar Co., 226 U. S. 217.....15, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

Number 199

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

NYE-SCHNEIDER-FOWLER CO.,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

Proceedings in error to reverse a judgment of the Supreme Court of Nebraska affirming in part a judgment of the District Court of Dodge County, Nebraska, imposing damages and attorney's fees against Plaintiff in Error, on account of dead and crippled hogs shipped from various points in Nebraska on the line of railway of Plaintiff in Error to South Omaha, Nebraska.

Defendant in Error sued in the District Court to recover $2,097.21 damages and $900.00 attorney's fees on account of 105 different shipments of hogs shipped during the year 1916 and 1917. The claims range in amount from three or four dollars up to fifty or sixty dollars each.

The proof on behalf of the plaintiff in the trial court tended to show that the animals were delivered to the Plaintiff in Error at loading point in good condition, but arrived at destination, that is, the stock yards of the Union Stock Yards Company of Omaha, Limited, in a dead or crippled condition.

At the trial the court instructed the jury as follows:

> "You are instructed that by the statutes of the State of Nebraska, when two or more railroads are connected together, the company owning each of such roads receiving freight to be transported to any place on the line of either of the roads so connected, shall be liable as common carriers for the delivery of such freight to the consignee of the freight in the same order in which such freight was shipped."

The effect of that instruction was to hold Plaintiff in Error liable as initial carrier for the condition of the animals during the entire transportation, a part of which was accomplished on the line of the Union Stock Yards Company of Omaha, Limited. The trial resulted in a verdict for plaintiff for $802.27. A motion for new trial was denied.

At the same time plaintiff below, by motion, requested the trial court to tax an attorney's fee in its favor in the sum of $600.00. Plaintiff in Error objected to the taxing of such attorney's fee upon the ground that *Section 6063, Revised Statutes of Nebraska, 1913*, is unconstitutional and void in that same if enforced will

"Deprive the defendant of its property without due process of law and deny to the defendant the equal protection of the law contrary to Section One of the Fourteenth Amendment to the Constitution of the United States."

This objection was overruled and the trial court taxed an attorney's fee of $600.00. From this judgment and costs Plaintiff in Error appealed to the Supreme Court of Nebraska, where the judgment was affirmed upon condition that a remittitur be made as to a portion of the verdict.

The Supreme Court of Nebraska, in its opinion, denied the contention of Plaintiff in Error that *Section 6058, Revised Statutes Nebraska, 1913,* if construed to make Plaintiff in Error liable as initial carrier for the entire transportation was unconstitutional and void as depriving Plaintiff in Error of its property without due process of law and denying to it equal protection of the law in violation of the Constitution of the United States and held,

"When a railroad company makes a contract to deliver live stock at a point beyond its own line, it becomes liable for the default of the connecting and terminal carriers under Section 6058, Revised Statutes, 1913, and cannot, in the event of such a contract, limit its liability as a carrier to its own line.

"Though such statute fixes a liability on the initial carrier for the default of another carrier and gives no express right of reimbursement to the initial carrier, the initial carrier has the right of reimbursement from the connecting carrier under the general principle of subrogation, and the statute cannot be said, on that objection, to be unconstitutional as depriving the initial carrier of its property without due process of law; nor is the statute unconstitutional as denying such carrier the equal protection of the law."

As to the amount of the verdict the Supreme Court held that it was excessive by the sum of $209.01 and ordered a remittitur of that amount as a condition of affirmance. This reduced the verdict to the sum of $593.26.

Between the time of the trial of the case in District Court and the hearing of the case on appeal in the Supreme Court the Legislature of Nebraska had amended *Section 6063, Revised Statutes, 1913*, to permit of the taxing of an attorney's fee in the Supreme Court,

> "in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney's fee to be fixed by such court or courts."

The Supreme Court held that the attorney's fees of $600.00, taxed by the trial court, was excessive and reduced it to $200.00. But the Court held that the plaintiff had done considerable work in the Supreme Court and was therefore entitled to an attorney's fee of $100.00 for the Supreme Court work and allowed that amount, thus leaving the attorney's fee at $300.00. Thus the Supreme Court of Nebraska held, in effect, that notwithstanding Plaintiff in Error was justified in its appeal to that Court on the ground of excessive attorney's fees and excessive verdict (because it reduced both the verdict and the attorney's fees) yet Plaintiff in Error was further penalized in the Supreme Court on account of the appeal to the extent of the additional $100.00 attorney's fee taxed.

The questions thus presented to this Court are:

1. Whether *Section 6058, Revised Statutes Nebraska, 1913*, as construed by the Supreme Court of the State, violates the Fourteenth Amendment to the Constitution of the United States, and

2. Whether *Section 6063, Revised Statutes Nebraska, 1913, as amended by Chapter134, Laws of Nebraska, 1919,* and as construed by the Supreme Court of the State, also violates the Fourteenth Amendment to the Federal Constitution.

SPECIFICATION OF ERRORS

I.

The Supreme Court of the State of Nebraska erred in holding and deciding that Section 6058, Revised Statutes of Nebraska, 1913, does not deny to plaintiff in error equal protection of the law nor deprive plaintiff in error of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; and erred in holding and deciding that the initial carrier of a shipment of livestock wholly within the State of Nebraska, who is held liable for all damages during the entire transportation, including damages occurring on the lines of connecting carriers, has a right to reimburse itself from the connecting carrier committing the injury under the general principle of subrogation, thereby rendering Section 6058 Revised Statutes of Nebraska, 1913, not unconstitutional as depriving the initial carrier of its property without due process of law, nor denying to the initial carrier equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

(Record, p. 107.)

Section 6058, Revised Statutes 1913, provides:

"Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped."

The trial court instructed the jury as follows (Record, p. 18):

> "You are instructed that by the statutes of the state of Nebraska when two or more railroads are connected together, the Company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected, shall be liable as common carriers for the delivery of such freight to the consignee of the freight in the same order in which such freight was shipped."
>
> "If you find from a preponderance of the evidence in this case that the defendants utilized the facilities and services of Union Stock Yards Company of South Omaha for the delivery to the consignee of the freight involved in this action, then the defendant is responsible for all of the acts or omissions, if any, of said Union Stock Yards Company to the same extent as if the defendant had itself operated said yards and terminal facilities."

The Supreme Court of Nebraska in its opinion (Record, p. 89) says:

> "When a railroad company makes a contract to deliver livestock to a point beyond its own lines, it becomes liable for the default of the connecting and terminal carriers under Section 6058 Revised Statutes 1913, and cannot, in the event of such a contract, limit its liability as a carrier to its own lines.
>
> "Though such statute fixes a liability on the initial carrier for the default of another carrier and gives no express right of reimbursement to the initial carrier, the initial carrier has a right of reimbursement from the connecting carrier under the general principle of subrogation, and the statute cannot be said, on that objection, to be unconstitutional as depriving the initial carrier of its property without due process of law; nor is the statute unconstitutional as denying such carrier the equal protection of the law."

In the body of the opinion (Record, pp. 93, 94 and 95) the Supreme Court says:

"It is admitted by the pleadings that plaintiff's shipments were all made to the Standard Livestock Commission Company at South Omaha. It appears from the evidence that the defendant, upon reaching South Omaha, turns its cars over to the Union Stock Yards Company, which handles the cars, pulls them into its unloading stations and there, itself conducts the unloading and delivery of the animals. The Stock Yards Company acts as terminal carrier for these shipments so long as its duties as a carrier continue. The damage to hogs, complained of, is shown to have existed immediately after unloading and before there was delivery or opportunity to deliver to the consignee, and there is, therefore, no proof that the obligation of the Stock Yards Company as a carrier had at that time terminated and that its obligation as a bailee, for which the initial carrier could not be held liable had commenced. See note, L. R. A. 1918-B 631. (Adams Seed Company vs. Chicago Great Western Railway Company, 181 Iowa 1052.)

"In this connection, the Court based certain instructions upon that portion of section 6058, Revised Statutes 1913, which reads as follows: 'Whenever two or more railroads are connected together, the Company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped;' and the jury were told that, though the damage to the hogs might have been sustained during the time that the Stock Yards Company handled them, still the defendant could be held liable for that damage as initial carrier.

"The defendant contends that the statute is not operative in this case, since the bill of lading, covering the shipments, in every instance, contained a provision that the 'responsibility of this railway company shall

cease upon delivery of said property to its connecting line,' and that, by virtue of this limitation, the defendant railroad could not be held liable for the default of the Stock Yards Company. Defendant relies upon the holding in Fremont, Elkhorn and Missouri Valley Railroad Company vs. Waters, 50 Nebr. 592; Fremont, Elkhorn & Missouri Valley Railroad Company vs. New York C. & St. L. R. Co., 66 Neb. 159; and Whitnack vs. Chicago, B. & Q. R. R. Co., 82 Neb. 464. Those cases are distinguishable from this, for in each of those cases the contract of carriage was over the line of the initial carrier only and was a contract only to deliver to the connecting carrier. It may be further noted that the portion of the statute, in question here, was in none of those cases invoked or referred to.

"In the case at bar the contract of carriage was to the Standard Livestock Commission Company at South Omaha, necessitating the employment of the Union Stock Yards terminal facilities to make delivery at the point of destination, designated in the contract of transportation. It is unnecessary to enter upon the question of whether or not a carrier can, in the face of this statute, limit its contract of carriage to its own lines, when the completed transportation contemplated necessitates the employment of a connecting carrier, for that is not the contract in this case. It seems clear to us, however, that, where the railroad company does make a contract for through transportation, as was done here, it cannot, at the same time, limit its liability to loss or damage occurring on its own lines and relieve itself from the default of its connecting carrier, the obligation for whose default is expressly imposed by the statute. Miller Grain & Elevator Company vs. Union Pacific Railroad Company, 138 Missouri 658, 40 S. W. 894; Burdis vs. Buffalo & S. L. R. Co., 24 N. Y. 269; Chicago, Rock Island & Pacific R. R. Co. vs. Western Hay & Grain Company, 2 Nebr. Unof. 784; St. Joseph & G. I. R. Co. vs. Palmer, 38 Nebr. 463; See Note 31 L. R. A. n. s. 52 and 53 (Atlantic Coastline R. R. Co. vs. Riverside Mills, 219 U. S. 186).

"Defendant raises the question that this statute is unconstitutional, for the reason that it fixes a liability upon an initial carrier for the default of a connecting carrier; does not furnish to the initial carrier any express right of procuring reimbursement when the loss occurs on the line of the connecting carrier; and hence deprives the initial carrier of its property without due process of law and denies to it the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States. For such loss, due to the fault of the connecting carrier, the initial carrier, it seems clear, would have the right of reimbursement under the general doctrine of subrogation, though the statute does not expressly so provide. Texas and Pacific Railroad Co. vs. Eastin & Knox, 100 Texas 556, 102 S. W. 105, 37 Cyc. 394."

II.

The Supreme Court of the State of Nebraska erred in holding and deciding that Section 6063, Revised Statutes of Nebraska, 1913, as amended by Chapter 134, Laws of Nebraska, 1919, is not unconstitutional and void as being in violation of the Fourteenth Amendment to the Constitution of the United States, and that same does not deprive plaintiff in error of its property without due process of law nor deny to plaintiff in error equal protection of the law in violation of said Fourteenth Amendment to the Constitution of the United States.

(Record, p. 107; Record, p. 98, p. 88, 87).

Section 6063, Revised Statutes Nebraska, 1913, provides:

"Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the State of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within sixty days, in cases of shipment or shipments wholly

within the state, and within ninety days in cases of shipment or shipments between points without and points within the state, after such claim, stating the amount and nature thereof, accompanied by the bill of lading or duplicate bill of lading or shipping receipt showing amount paid for or on account of said shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent, or the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent per annum from the date of the filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction; Provided, in bringing suit for the recovery of any claim for loss or damage, as herein provided, if the consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such consignee or consignor, or real party in interest, shall not recover the interest penalty or attorney's fees herein provided."

Amount sued for in the trial court was $2,097.21 damages (Record, p. 9). Verdict and judgment recovered in trial court $802.27 (Rec., p. 25). This occurred on February 1, 1919. Objections to the allowance of attorney's fees under the statute were duly made in the trial court (Rec., pp. 32, 36, 38).

Attorney's fees of $600.00 allowed in the trial court February 24, 1919 (Rec., pp. 33 and 34).

Chapter 134, Laws of Nebraska, 1919, amending Section 6063, Revised Statutes 1913, became effective July 18, 1919, and provides:

"Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the State of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of shipment or shipments between points without and points within the state, after such claim, stating the amount and nature thereof accompanied by the bill of lading or duplicate bill of lading or shipping receipt showing amount paid for or on account of said shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent, or the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided, within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent per annum from the date of filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction, and in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts; Provided, in bringing suit for the recovery of any claim for loss or damage, as herein provided, if consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the

common carrier liable hereunder, then such consignee or consignor, or real party in interest, shall not recover the interest penalty or attorney's fee herein provided."

Order of the Supreme Court affirming the judgment below was entered September 27, 1920, as follows (Rec., p. 88):

"This cause coming on to be heard upon appeal from the District Court of Dodge County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said District Court. It is, therefore, ordered and adjudged that the judgment of the district court allowing the sum of $600.00 for plaintiff's attorney's fee in that court be, and the same hereby is, reduced to the sum of $200.00, and it is further ordered that should plaintiff file a remittitur in the amount of $209.01 from the judgment of $802.27, within twenty days from the entry hereof, leaving a judgment of $593.26, said judgment of the trial court should be affirmed, otherwise said judgment will be reversed and cause remanded for further proceedings. It is further ordered and adjudged that plaintiff be allowed the sum of $100.00 for his attorney's fee in this court."

The remittitur was duly filed (Rec., pp. 96, 97).

In its opinion the Supreme Court says (Rec., p. 90):

"Section 6063, Revised Statutes 1913, making provision for attorney's fee to plaintiff's attorneys upon claims against a railroad, held to allow recovery in the nature of reimbursement of costs and not unconstitutional as providing a penalty in favor of an individual.

"An attorney's fee, to be reasonable, under such a statute, should be based upon a consideration of the value of the attorney's service to his client and the amount of time and labor expended by him, but should

not bear an unfair proportion to the amount of the judgment recovered."

In the body of the Opinion the Supreme Court said (Rec., pp. 95-96):

"The trial court allowed an attorney's fee of $600.00 to plaintiff's attorneys, under Section 6063, Revised Statutes, 1913. Defendant contends that this statute is unconstitutional, since it imposes a penalty upon the railroad in favor of an individual. This question is foreclosed by the holdings in Smith v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, 92 Neb. 719, and Marsh and Marsh vs. C. & N. W. Ry. Co., 103 Neb. 654, 173 N. W. 679. It is there decided that an allowance of an attorney's fees is in the nature of a provision for costs and does not amount to a penalty. A provision for costs is intended to furnish reasonable reimbursement to the litigant, who is compelled to bring suit and incur expense, caused by the wrong of the losing party. The amount of these fees is left to the discretion of the court, the limitation of the statute being that the amount must be reasonable. So long as the fees are reasonable in amount, and not exorbitant the statute does not operate as a penalty, since it provides only reimbursement of necessary expenses. It was not intended by this statute that the railroad company should pay double damages. An attorney's fee to be reasonable must, under such a statute, not only be based upon a consideration of the value of the attorney's services to the plaintiff, and the amount of time and labor expended by him, but must bear some fair proportion to the amount of the judgment recovered. In this case plaintiff sued for some $3,000.00. A judgment for $802.27 was obtained, and, in order that the judgment may be allowed to stand, it is necessary that it be cut down by way of remittitur in the amount of $209.01. Though the plaintiff's attorneys have done a considerable amount of work in preparation for the trial of this case, still, under the circumstances disclosed by the record, we must hold that a $600.00

attorney's fee is more than can reasonably be allowed, and it is ordered that the attorney's fee for plaintiff's attorneys in the trial court be fixed at $200.00. An attorney's fee of $100.00 is allowed plaintiff's attorneys for services in this court. It is further ordered that, should the plaintiff file a remittitur in the amount of $209.01, within twenty days from the entry hereof, the judgment of the trial court be affirmed; on the other hand, should such remittitur not be filed, that the case be reversed and remanded for further proceedings in accordance with this opinion."

BRIEF OF ARGUMENT

I.

The Legislature of a State cannot, by statute, lawfully impose upon a railroad company as initial carrier absolute liability to the shipper for losses occasioned by a connecting carrier, without providing in favor of such initial carrier an equally adequate remedy against the connecting carrier thus causing the loss.

II.

The common law principle of subrogation read into such a statute by the highest court of the State cannot avail to clear the statute of its void nature, since subrogation is not an absolute right but is a matter of equity only.

Meeker vs. Larson, 65 Neb. 158.

Northern Trust Company vs. Consolidated Elevator Co., 4 A. L. R. 510, 515, 516.

1 L. R. A. page 641 (note).

13 L. R. A. page 619 (note).

Pomeroy's Equity Jurisprudence, 3rd ed. Vol. 4, Sec. 1419 and note.

Memphis, etc., R. R. vs. Dow, 120 U. S. 287, 301, 302.

III.

To compel one railroad by legislative fiat to pay the debt of another railroad without any legal remedy over as attempted by Section 6058 Revised Statutes Nebraska, 1913,

is abhorrent to fundamental principles of right, and violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

Truax, et al, vs. Corrigan, et al, 42 Sup. Ct. Rep. 124.

IV.

Section 6063, Revised Statutes Nebraska, 1913, denies to Plaintiff in Error equal protection of the law and due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution because it arbitrarily holds the carrier liable in every case regardless of whether or not plaintiff recovers the amount demanded.

Gulf Colorado & Santa Fe R. R. vs. Ellis, 165 U. S. 150.
St. Louis, Iron Mountain & Southern Ry. vs. Wynne, 224 U. S. 354.
C., M. & St. P. Ry. vs. Polt, 232 U. S. 165.
C., M. & St. P. Ry. vs. Kennedy, 232 U. S. 626.
Truax, et al, vs. Corrigan, et al, 42 Sup. Ct. 124.
Union Terminal Co. et al vs. Turner Construction Co., 247 Fed. 727.

V.

The Statute (as amended by Laws of Nebraska, 1919, Chapter 134), as construed by the Supreme Court of Nebraska, is unreasonable and penalizes a carrier for resorting to the court, even in cases where its appeal is vindicated.

Nye-Schneider-Fowler Co. vs. C. & N. W. Ry. Co., 105 Neb. 151 (case at bar).

VI.

The Statute is unlike other statutes this Court has sustained, in that the Statute in question is not a proper exercise of the police power, being unlimited as to amount of claims and unlimited as to amount of penalty or attorney's fees.

M., K. & T. Ry. vs. Cade, 233 U. S. 642.
Seaboard Airline Ry. vs. Seegers, 207 U. S. 73.
Yazoo & M. V. R. R. Co. vs. Jackson Vinegar Company, 226 U. S. 217.

VII.

As applied the Statute allows double or treble damages.

Wagner vs. Union Stock Yards Co., et al, Sup Ct. Nebr. Case No. 21698, decided February 16, 1922 (On a claim for $47.00, attorney's fee of $150.00 allowed).

VIII.

The Statute has been construed as not providing for a penalty (otherwise it would violate the State Constitution, Article 8, Section 5, requiring that all penalties be paid into the common school fund) but as a provision for court costs.

Smith vs. C., St. P., M. & O. Ry. Co., 99 Neb. 719.
Marsh & Marsh vs. C. & N. W. Ry. Co., 103 Neb. 654.
Nye-Schneider-Fowler Co. vs. C. & N. W. Ry. Co., 105 Neb. 151.

ARGUMENT

Are these two statutes unconstitutional? In support of our contention that they are we submit the following:

Section 6058 Revised Statutes of Nebraska, 1913, provides:

> "Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight to the consignee of the freight, in the same order in which such freight was shipped."

This Statute has been on the books in Nebraska for more than forty years. This is probably the first time it has ever been seriously considered by the Nebraska Court.

It will be noted from the opinion of the Nebraska Court that the contract of shipment involved in this case provided:

> "Responsibility of this railway company shall cease upon delivery of said property to its connecting line."

The opening sentence of this Statute is nothing but a declaration of the common law. Under the common law in Nebraska, as well as the common law generally, a common carrier was not liable for damage to the goods beyond its own line unless by express contract it agreed to be so liable. Thus:

In the case of *F., E. & M. V. R. R. Co. vs. Waters,* 50 Neb. 592, it is said:

> "A railway company receiving for shipment goods consigned to a point on the line of a connecting carrier, under an agreement to transport them to the terminus of its own road, is neither by common law nor by statute of this state answerable therefor after their safe delivery to the connecting line named in the bill of lading or contract for shipment."

In the case of *F., E. & M. V. R. R. Co. vs. N. Y. C. & St. L. Ry.,* 66 Neb. 159, it is said:

> "Although a railroad company enters into a joint contract with another such company for the transportation of goods to a point beyond the end of its own line, it is competent for it to enter into an express contract with the shipper limiting its liability to the transportation of the property over its own line."

In *Whitnack vs. C., B. & Q. R. R. Co.,* 82 Neb. 464, it is said:

> "The rule both at common law and in this State is that a common carrier is not liable for the negligence or

defaults of the connecting carrier, in the absence of a contract making it liable therefor."

This Court has announced a similar rule. Thus: In *Myrick vs. Michigan Central Railroad Co.*, 107 U. S. 102, it is said at page 106:

> "A railroad company is a common carrier of goods for the public, and as such is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the Company receiving the shipment, there must be a special agreement for it. * * * This is the doctrine of this court. * * * As was said in Railroad Company vs. Manufacturing Company, 'it is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction.' "

In the face of these decisions and the opening sentence of the Statute which declares for the common law, it is difficult to understand how the Nebraska Court arrived at the construction that this Statute extends the common law liability and makes the initial carrier liable for the whole transportation. But it has given the Statute that construc-

tion in its opinion in this case and it may be this Court will feel bound to adopt that construction.

Looking at the Statute as thus construed, is it constitutional? It holds Plaintiff in Error liable for losses occurring on its connecting carriers without any provision whatever whereby Plaintiff in Error can be made whole against the connecting carrier who may have been guilty of the wrong. As construed by the Nebraska Court the Statute makes the first carrier absolutely liable for the entire transportation. It affords to the first carrier no remedy over against any other connecting carrier. But the State Court says that under the general doctrine of subrogation the initial carrier would have the right to reimburse itself against a connecting carrier. It will be observed, however, that the legislature has granted no such right of subrogation in this Statute. Subrogation is not a right. It is purely a matter of equity. Thus: In *Mecker vs. Larsen*, 65 Neb. 158, it is said:

> "While subrogation is not founded on contract, and is a creation of equity, existing solely for accomplishing the ends of substantial justice, there must in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence, as recognized and enforced by courts of chancery."

This Court held in *Memphis, etc., R. R. vs. Dow*, 120 U. S. 287, at pages 301 and 302:

> "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties."

If the Legislature had said in so many words that the initial carrier should be liable for the wrongs of the connect-

ing carrier and that the initial carrier, upon payment of the damage, might use its best efforts to recover against the guilty carrier, we do not believe that a right so uncertainly granted could be called due process of law. But the Legislature has not even done that much. It has said that the first carrier shall be liable absolutely for the wrongs and must pay the debts of connecting carriers and has been entirely silent on the question of the right of the first carrier to make itself whole against connecting lines. So far as our investigation is concerned this procedure is so unusual as to be without precedent. We submit, however, that if the Legislature of a State attempts by an exercise of the police power to require the initial carrier to pay the debt of a connecting carrier, it must, as a necessary corallary of the duty thus imposed, give to the first carrier the absolute right to recover against the guilty connecting carrier. The Legislature has not even given sanction to the doctrine of subrogation.

As we have seen, both by the holdings of the Nebraska Court and this Court, subrogation is a doctrine of equity only. It may or may not afford a party relief, depending upon the circumstances existing between the parties.

To condemn the initial carrier to payment of the debts of its connecting carriers without giving to the initial carrier a remedy as positive as the duty it imposes is absolute, certainly to our mind, falls short of equal protection of the law and due process of law contemplated by the constitution. As is well said by Mr. Chief Justice Taft in *Truax vs. Corrigan*, 42 Sup. Ct. Rep. 124, at page 129:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it con-

demns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial. So that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Hurtado vs. California, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of law and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws."

We respectfully submit that for the legislature to lay upon the initial carrier the unlimited obligation of paying the debts of the connecting carrier and giving to the one thus imposed upon the doubtful remedy by way of subrogation for a return of the money affords to the initial carrier less than the minimum of protection under the due process and equality clauses of the Federal Constitution. The right to recover over should be as absolute as the duty to pay in the first instance. Of course the ultimate recovery would naturally depend upon the proof. But the *right of action* against the connecting carrier should be expressly given by the Legislature. Less than that is not due process of law as we understand the Fourteenth Amendment to the Constitution.

Section 6063, Revised Statutes Nebraska, 1913, as amended by Chapter 134 Laws of Nebraska, 1919, is also claimed to be unconstitutional. In support of the claim we submit.

A mere reading of the statute shows that it is aimed at common carriers. No other classes of defendants are

affected by it. While the statute uses the word "penalty" the State Court has said that the attorney's fee is not a penalty, but is court costs.

Viewing the Statute as providing only for court costs it appears to us to be an arbitrary and unreasonable classification. What valid basis is there for the legislature of a state to provide that court costs shall be thus and so with reference to litigants generally, but as to common carriers they shall be immeasurably greater? As this statute has been actually applied by the courts of Nebraska, it amounts to an allowance of double and even treble damages. Applied as the court applied it in the case at bar it amounts to a forfeiture against the Railway Company if it dares assert its right of appeal to the Supreme Court, even in cases where the Court finds that the appeal was justified. The statute is not limited as to the classes of claims to which it applies. It applies to the claim of the millionaire as well as the claim of the pauper. The legislature was not interesting itself in protecting small claims against unnecessary and vexatious litigation. The attorney's fee is left entirely to the discretion of the court.

If the statute applied only to small but just claims, then the discretion which the court might exercise in allowing a reasonable attorney's fee, would be well circumscribed. But with the statute unlimited and the class of claims covered by it amounting to tens of thousands of dollars the statutory attorney's fee represented in amount by the discretion of the court may well run into thousands of dollars in each case. Nor is the plaintiff in the case required to prove the claim which he makes against the defendant. The burden is cast upon the defendant to discover all of the facts, including those in possession of the plaintiff, and make a tender to the plaintiff of the exact amount which

he should have, as a condition of escaping the attorney's fee. If the plaintiff sees fit to make an extravagant demand and brings suit against the carrier on such extravagant demand he may, as the statute is construed by the State Court, recover only a fraction of his demand, yet penalize the carrier by the recovery of a large attorney's fee.

Look at the facts in this case. Plaintiff sued for $2,097.21 damages. Upon a trial to a jury it received a verdict of $802.27 damages. Of this amount the Supreme Court of the State says that it was excessive and it reduced the verdict by the sum of $209.01, thus leaving it at $593.26.

The trial court, on a verdict of only $802.27 assessed attorney's fees of $600.00 and the Supreme Court leaves those fees at $200.00, but notwithstanding Plaintiff in Error was justified in its appeal to the Supreme Court of Nebraska and received from that Court relief as to the amount of the verdict, it was nevertheless assessed with an additional $100.00 attorney's fee in the Supreme Court.

The Defendant in Error is also a corporation capitalized at millions of dollars. It is amply able to pay the expenses of litigation in which it may choose to engage. The police power of the state is not necessary to its assistance. Yet by this statute the costs of the case are one thing for the Defendant in Error and an entirely different thing for the Plaintiff in Error.

In other words, viewing this statute as a regulation of court costs the situation is the same as though the Legislature of Nebraska had said that as to litigants generally the court costs shall be so much, but as to common carriers they shall pay an amount which may equal many times the costs which other litigants must pay, depending

upon the discretion of the Court. This is not equality before the law. It is not equal protection of the law. It is not due process of law, for the great body of litigants to pay court costs upon a general uniform rule, while common carriers are subjected to enormous penalties in the name of attorney's fees, which are designated as court costs with the amount unlimited except in the discretion of the court, which is never the same in two cases.

A Statute of Texas, similar to this one, was condemned by this Court in *Gulf Coast and Santa Fe Railway vs. Ellis*, 165 U. S. 150, the court saying, page 153:

> "The Supreme Court of the State considered this Statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

> "It is true the amount of the attorney's fee which

may be charged is small, but if the state has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved."

It is further said at Page 155 of the opinion:

"The State may not say that all white men shall be subjected to the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

And again at page 156-157 of the Opinion:

"It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. But the provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right of protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debt, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other."

And again at Page 158 of the Opinion:

"But a mere statute to compel the payment of indebtedness does not come within the scope of police

regulation. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

It must be remembered in this connection that the Supreme Court of Nebraska says this Statute does not provide for a penalty, but only for court costs. Common carriers have been selected by the Legislature of Nebraska as the target for enormous court costs, which no other class of litigant is required to pay.

Still quoting from above case, pp. 159, 160:

"But, arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court in Yick Wo vs. Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to construe that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which

the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Again bearing in mind that the Nebraska Statute does not require that the plaintiff recover all that he claimed, Indeed he may recover only a small fraction of his claim and yet be entitled to the attorney's fee as the Statute has been construed.

A similar situation was presented to this Court in *St. Louis, Iron Mountain and Southern Railway Co. vs. Wynne*, 224 U. S. 354, where the Court said:

"The Statute of Arkansas of 1907, Act 61, providing that railroad companies must pay claims for livestock killed or injured by their trains within thirty days after notice and that failure to do so shall entitle the owner to double damages and an attorney's fee, even if the amount sued for is less than the amount originally demanded, as construed by the Supreme Court of that State, is unconstitutional as a denial of due process of law under the Fourteenth Amendment."

Speaking through Mr. Justice Van Devanter, this Court said (pp. 350, 360 and 361):

"We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special treatment by the legislature as was the case with the

statute considered in Seaboard Airline Railway vs. Seegers, 207 U. S. 73, but attaches onerous penalties to the non-payment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly this cannot be done consistently with due process of law."

In *Chicago, Milwaukee & St. Paul Railway Co. vs. Polt,* 232 U. S. 165, this Court was considering a statute of South Dakota:

"The Statute of South Dakota of 1907, Chapter 215, making railroad companies liable for double damages in case of failure to pay a claim or to offer a sum equal to what the jury finds the claimant entitled to, held to be unconstitutional as depriving the companies of their property without due process of law."

In that case the plaintiff had demanded $838.20. He recovered a verdict of only $780.00. The railroad company had offered only $500.00 in settlement. The court says (page 168):

"No doubt the States have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand."

The Nebraska Statute, as pointed out, is clearly subject to the same criticism. Take the case at bar. What opportunity did the Railroad have of selecting out of the 105 causes of action involved in this case those few meritorious

ones which the jury said plaintiff was entitled to recover and subtract from those the causes of action which the Supreme Court said were not supported by proof and make tender of the amount which the Supreme Court found finally to be due? It was an impossible task. A statute which requires that demands the unreasonable and the impossible. It does not observe the rudiments of fair play. It denies due process of law and equal protection of the law and is void.

Nebraska Statute different from any other which has been sustained.

This Court has sustained a number of attorney's fees or penalty statutes but each of them was entirely different in principle from the statute in question. Thus in *Seaboard Airline Railway vs. Seegers,* 207 U. S. 73, the plaintiff was required, as a condition of recovering the penalty, to recover the full amount of his claim and the penalty was limited to $50.00. That was an exercise of the police power to coerce by a moderate penalty the enforcement of just demands which were found upon trial to have been unjustly refused.

In *Yazoo and Mississippi Valley Railroad Company vs. Jackson Vinegar Company,* 226 U. S. 217, the statute of Mississippi was limited to claims for less than $200.00 and the penalty was limited to $25.00. Another clear exercise of the police power to coerce by reasonable penalty the payment of small claims.

In *M., K. & T. Ry. vs. Cade,* 233 U. S 642, a statute of Texas embraced claims against all kinds of people and corporations. It was not directed at railroad companies or common carriers. It embraced claims for $200.00 or less

and limited the attorney's fee to $20.00. Another exercise of the police power to enforce the payment of small claims.

CONCLUSION

In conclusion, we submit that both statutes deny to Plaintiff in Error equal protection of the law. We again adopt the language of Chief Justice Taft in *Truax vs. Corrigan, supra,* quoting from Mr. Justice Matthews, in *Yick Wo vs. Hopkins,* 118 U. S. 356, 369:

> "Speaking for the Court of both the due process and equality clause of the Fourteenth Amendment 'these provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this Court. It emphasizes the additional guarantee of a right which the clause has conferred beyond the requirement of due process."

To the end that the constitutional rights of Plaintiff in Error may be vindicated and these oppressive statutes of the State of Nebraska be stricken down, we respectfully ask that the judgment in this case be reversed.

Respectfully submitted,

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Counsel for Plaintiff in Error.

F. W. SARGENT,
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IN THE

Supreme Court of the United States of America.

OCTOBER TERM, 1921.

No. [redacted]24

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

against

NYE SCHNEIDER FOWLER CO.,
Defendant in Error.

BRIEF FOR DEFENDANT-IN-ERROR.

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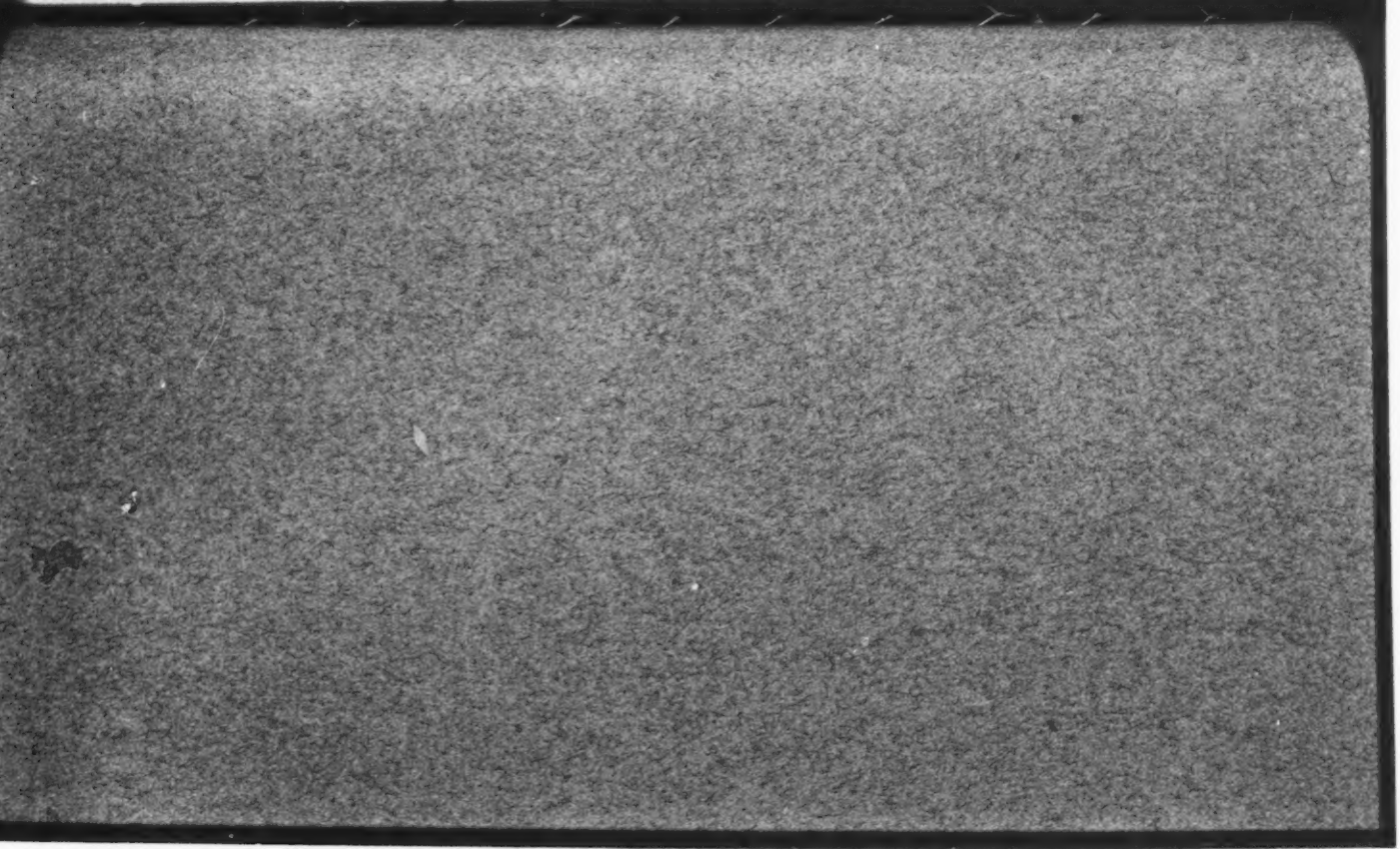

INDEX.

PAGE

Statement of the Case..... 1-4

POINT I.

Section 6058 Revised Statutes Nebraska is constitutional..... 4-13

POINT II.

Section 6063 Revised Statutes Nebraska as amended, Laws 1919, c. 134, is constitutional 14-36

EXHIBIT A.

Opinion of Supreme Court of Nebraska in Wagner *v.* Union Stock Yards Company 37-42

LIST OF CASES CITED.

Arnold *v.* Green, 116 N. Y. 566..... 6

Atchison, T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96, 19 Sup. Ct. 609.11, 21, 22, 23, 24, 27

Atlantic Coast Line Ry. *v.* Glenn, 239 U. S. 388, 36 Sup. Ct. 154..... 4, 5

Atlantic Coast Line Ry. *v.* Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164..... 4, 26

Carey *v.* State of South Dakota, 250 U. S. 118, 39 Sup. Ct. 403..... 10

Chi., etc., Ry. *v.* Polt, 232 U. S. 165, 34 Sup. Ct. 301..... 33, 34

PAGE

Express Co. *v.* Kountze, 8 Wall. 342..... 8

Farmers & M. Ins. Co. *v.* Dobney, 189 U. S. 301, 23 Sup. Ct. 565..... 24

Fidelity Mut. Life Ass'n. *v.* Mettler, 185 U. S. 308, 22 Sup. Ct. 662..... 24

Fisher *v.* Milwaukee, etc., Ry. Co., 173 Wis. 57, 180 N. W. 269..... 7, 9

Gulf, etc., Ry. *v.* Ellis, 165 U. S. 105, 17 Sup. Ct. 255.....16, 17, 20, 21

Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 29 Sup. Ct. 115.... 10

Holmes *v.* Balcom, 84 Me. 226, 24 Atl. 821.. 7

Kansas City Southern Ry. *v.* Anderson, 233 U. S. 375, 34 Sup. Ct. 599..... 31, 32

Knights Templars *v.* Jarman, 187 U. S. 197, 23 Sup. Ct. 108..... 10

Louisville & N. R. Co. *v.* Western Union Telegraph Co., 248 U. S. 576, 39 Sup. Ct. 18, 249 Fed. 385..... 12

Marsh *v.* Chi., etc., Ry., 103 Neb. 654..... 14, 15

Matthews *v.* Aikin, 1 N. Y. 595..... 13

Missouri, etc., Ry. *v.* Cade, 233 U. S. 642, 34 Sup. Ct. 678.....17, 20, 27, 31

Missouri, etc., Ry. *v.* May, 194 U. S. 267, 24 Sup. Ct. 638 ..... 21, 22

Mo. Pac. Ry. *v.* Tucker, 230 U. S. 340, 33 Sup. Ct. 961 ..... 33, 34

Red River Bank *v.* Craig, 181 U. S. 548, 21 Sup. Ct. 703 11

St. Louis, etc., Ry. *v.* Wynne, 224 U. S. 354, 32 Sup. Ct. 493 ..... 33, 34

Seaboard Air Line Ry. *v.* Seegers, 207 U. S. 73, 28 Sup. Ct. 28.....17, 19, 21, 26, 27, 28

PAGE

Smith *v.* Chi., etc., Ry., 92 Neb. 719.....14, 16, 32
Syracuse Lighting Co. *v.* Maryland Casualty Co., 226 N. Y. 25..... 7, 9
Texas & P. R. Co. *v.* Eastin & Knox, 100 Tex. 556, 102 S. W. 105, 37 Cyc. 394..... 6, 7, 8
Truax *v.* Corrigan, 42 Sup. Ct. 124..... 24, 33
Wagner *v.* Union Stock Yards Co., Sup. Ct. Nebr. Case No. 21698 .....14, 35, 37
Williams *v.* Hernon, 13 Abb. Pr. 297..... 30
Yazoo, etc., Ry. *v.* Jackson Vinegar Co., 226 U. S. 217, 33 Sup. Ct. 40.....17, 18, 20, 27

Ames, Lectures on Legal History, p. 155-6.. 13
15 Corpus Juris, p. 154 30
5 Wait's New York Practise, p. 4610..... 30

IN THE

Supreme Court of the United States of America.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

NYE SCHNEIDER FOWLER CO.,
Defendant in Error.

October Term, 1921.
No. 199.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

The defendant in error, a stock shipper, originally brought this action to recover $2,097.21 damages and $900.00 attorney's fees, in the (State) District Court of Dodge County, Nebraska, against the plaintiff in error, as initial carrier, for damage to hogs during shipments from Fremont, Neb., to South Omaha, Neb.,—shipments wholly within the State of Nebraska, and made without a caretaker. The defendant in error, having been the plaintiff below, will hereafter be so styled; the plaintiff in error will hereafter be called the defendant.

That portion of the state statute which permit-

ted the plaintiff to proceed directly against the defendant, reads as follows:

> "Any railroad company receiving freight for transportation shall be entitled to the same rights and subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight to the consignee of the freight, in the same order in which such freight was shipped."
>
> Revised Statutes of Nebraska, 1913, sec. 6058.

The constitutionality of this statute is challenged in one of the assignments of error of the plaintiff in error, as will appear *infra*.

The case as finally submitted to the jury involved seventy-one separate causes of action, and the recovery under the verdict of the jury amounted to about $800 (Rec. p. 96). The trial court, by way of further recovery, allowed an attorney fee of $600 to the plaintiff (Rec. p. 34). On appeal to the Supreme Court of Nebraska, that court held that $600 was more than could reasonably be allowed for attorney's fees under the statute, because that sum did not bear a fair relation to the amount of the judgment recovered (Rec. p. 96). Consequently the allowance for attorney's fees was cut down, by way of remittitur, to the amount of $200 ~~$209.01~~ (Rec. p. 96). It was further ordered that plaintiff be allowed the sum of $100 for its attorney's fees in the Supreme Court of Nebraska.

The recovery of attorney's fees was allowed

under a statute of Nebraska (Rev. Stat. Neb. 1913, § 6063, as amended by Laws 1919, c. 134). This statute, as it stands in its amended form, is quoted in full by the appellant's brief (p. 11), so we need only give its substance. It provides that every claim for loss or damage to property or overcharge for freight for which any common carrier in the state may be liable, shall be adjusted and paid within a certain period after presentation of the claim. This period is sixty days for an intrastate shipment and ninety days for an interstate shipment. In case the claim is not paid within this period the carrier shall be liable for interest at seven per cent. from the date of the filing of claim "and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction", and, if an appeal is taken and plaintiff succeeds therein, an additional fee shall be allowed. But there is a proviso that if the plaintiff should fail to recover a judgment in excess of the amount that may have been tendered by the carrier in an offer of settlement, then the plaintiff "shall not recover the interest penalty or attorney's fees herein provided".

This statute and the recovery permitted under it, are challenged by the plaintiff in error as being unconstitutional, on grounds which will appear *infra* (Rec. p. 107).

The assignments of error upon which the appellant's brief relies present two questions:

1. The constitutionality of the Nebraska statute allowing recovery against the initial carrier (Assignments of Error III-IV, Rec. p. 107).

2. The constitutionality of the Nebraska statute allowing the recovery of a reasonable attorney's fee in suits against common carriers (Assignment II, Rec. p. 107).

An assignment of error also presented a question as to the admissibility of the "Stock Yards Record Book" as evidence in the plaintiff's behalf at the trial (Assignment V, Rec. p. 107). But, as the appellant's brief does not urge this assignment, it seems unnecessary further to notice it. We therefore devote our argument to the questions raised by the appellant, concerning the constitutionality of the two statutes above mentioned.

I.

The Nebraska statute (R. S. Neb., 1913, § 6058) allowing suit against the initial carrier, is constitutional.

If this statute had expressly allowed to the initial carrier a right of recovery over against the connecting carrier, there would have been no room for argument. Such statutes are constitutional, whether made by Congress as regards interstate commerce (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164) or by any State to cover intrastate shipments (*Atlantic Coast Line* v. *Glenn*, 239 U. S. 388, 36 Sup. Ct. 154).

> "Coming to the merits we are of the opinion that the case is controlled by *Atlantic Coast R. Co.* v. *Riverside Mills*, 219 U. S. 186, 55 L. ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164. In that case the constitutionality of the act of Congress known as the Carmack

amendment to the act to regulate commerce was considered, the question presented being whether Congress, under its powers to regulate commerce, could make an initial carrier liable to the holder of a bill of lading issued by it for a through shipment of property over its own and connecting lines for a loss occurring after the property had been delivered by it to a connecting carrier and while in the control of such carrier. It was decided that the act was a valid regulation of interstate commerce, and hence that no rights of the initial carrier secured by the 5th Amendment had been violated. It is true that case involved the power of Congress over interstate, while this concerns the power of a state over intrastate commerce, but the reasoning by which the conclusion as to the existence of the power was sustained in that case compels a like conclusion with reference to the power of a state over commerce wholly within its own borders."

Atlantic Coast Line R. Co. v. *Glenn* (239 U. S. 388, 36 Sup. Ct. Rep. 154).

The statute at bar differs from those above discussed in that it does not expressly give the initial carrier a right of recovery over against the connecting carrier. But the distinction is of no importance, because such a right would exist anyhow. A statute of this class would be unconstitutional only if it forbade a recovery over, and thus deprived the initial carrier of a right which otherwise it would have. But no violation of the Fourteenth Amendment can be found in the mere fact that the statute says nothing on the subject. By saying nothing it recognizes the right.

That is the point of the decision below; the Court saying:

"Defendant raises the question that this statute is unconstitutional, for the reason that

it fixes a liability upon an initial carrier for the default of a connecting carrier; does not furnish to the initial carrier any express right of procuring reimbursement when the loss occurs on the line of the connecting carrier; and hence deprives the initial carrier of its property without due process of law, and denies to it the equal protection of the law, in violation of the 14th amendment to the Constitution of the United States. For such loss, due to the fault of the connecting carrier, the initial carrier, it seems clear, would have the right of reimbursement under the general doctrine of subrogation, though the statute does not expressly so provide. *Texas & P. R. Co.* v. *Eastin & Knox,* 100 Tex. 556, 102 S. W. 105, 37 Cyc. 394" (Rec. p. 94).

This right of the initial carrier, who has been compelled to pay the loss, to recover against the connecting carrier if in fact the latter's act has caused the loss, cannot be questioned. It rests upon the broad basis of subrogation. That remedy "is no longer limited to sureties and quasi sureties, but includes so wide a range of subjects that it has been called the 'mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it' ". (*Arnold* v. *Green,* 116 N. Y. 566, 571). In the absence of a statute of the kind under consideration, the connecting carrier would be the one to pay, and would also be the only one whom the plaintiff could sue. The only effect of the statute is to allow the plaintiff to sue the initial carrier. But the initial carrier, having thus been obliged to pay, is entitled to be made whole by the party who ought, had it performed its duty, to have paid the plaintiff at the outset, because, of the two, the con-

necting carrier is the one whose act caused the loss, and who ought in the end to bear the burden. If then, by reason of any sort of circumstances, statute, or what not, the initial carrier has actually paid the plaintiff for a loss which was, in fact, caused by the act of the connecting carrier, then the initial carrier, under fundamental principles which no statute is required to enunciate, is subrogated to the claim which the plaintiff actually had against the connecting carrier; and, being so subrogated, can recover.

Texas, etc., Railway Co. v. *Eastin* (100 Tex. 556, 102 S. W. 105).

Holmes v. *Balcom* (84 Me. 226, 24 Atl. 821).

Fisher v. *Milwaukee, etc., Railway Co.*, (173 Wis. 57, 180 N. W. 269).

Syracuse Lighting Co. v. *Maryland Casualty Co.* (226 N. Y. 25).

In the first of the cases above cited the plaintiff joined the initial (T. & P. Ry.) and the connecting (Frisco system) carriers. Judgment was rendered in favor of the plaintiff against the initial carrier, and in favor of the original carrier against the connecting carrier; and both defendants appealed. The loss had occurred on the line of the connecting carrier, and there appears to have been no statute in Texas at that time making the initial carrier responsible. But the court affirmed the judgment as to the initial carrier on the ground that it appeared as a fact that there had been a deviation by the initial carrier from the routing requested by the plaintiff, and that consequently the initial carrier was liable for any loss occurring while the

property was in the hands of a connecting carrier selected by itself and thus actually being its agent (*Express Co.* v. *Kountze,* 8 Wall. 342). It also affirmed the judgment in favor of the initial carrier against the connecting carrier, saying:

> "The St. Louis & San Francisco Railway Company were responsible to the plaintiffs for all damages which accrued to their cattle by reason of its negligence while in its hands, notwithstanding the liability of the initial carrier for the same loss. The Texas & Pacific Railway Company having become the insurer of the cattle after they were delivered to its connecting carrier—when it was adjudged to pay for the negligence of the latter, it was subrogated to the right of the plaintiffs and had the right to be reimbursed for what it was required to pay on account of the negligent conduct of the St. Louis & San Francisco Railway Company."
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> *Texas & P. R. Co.* v. *Eastin* (100 Tex. 556, 561-2).

In the Wisconsin case cited the plaintiff received personal injuries through the negligence of a Street Railway Company, but unskillful treatment of a physician aggravated the injury. Under a state statute allowing a third party to be brought in as defendant if the original defendant claimed a right of recovery over against him, a physician was brought in as a co-defendant with the Street Railway Company and the latter, by way of cross-complaint, claimed reimbursement for such damages as might be recovered which would not be attributable to the plaintiff's condition as it would have been had skillful treatment been demonstrated. It was held that the physician was properly brought in and that the cross-complaint was good on de-

murrer; the decision being that, the Railway Company having been guilty only of negligence, it was not in such a position as to preclude a recovery over against the physician.

Fisher v. *Milwaukee, &c., Ry.* (173 Wis. 57, 180 N. W. 269).

The same proposition was applied by the New York Court of Appeals in a case of corporate merger. The plaintiff had, under the statute, merged into itself another company. This merged company had carried a liability policy which was not assignable. By reason of the merger, and of the statute governing the same, the plaintiff became liable to a person who had received injuries through the negligence of the merged company. The Court of Appeals held that, the plaintiff having paid the judgment for which it thus became liable, it was entitled through the principle of subrogation to recover against the Casualty Company, although it was not entitled to take the policy by assignment.

Syracuse Light Co. v. *Maryland Casualty Co.* (226 N. Y. 225).

In other words, the idea of an assignment does not lie at the bottom of the principle of subrogation. The question, as the New York courts have said, is simply who ultimately owes the debt which some intermediate person has been compelled to pay.

Such being the defendant's fundamental right, a statute which does not purport to deprive him of it cannot be unconstitutional. There is not a word in the statute to that effect, and its meaning is quite clear to the contrary. But, even if its meaning were doubtful, this court should uphold the

interpretation for which we contend, and thus sustain the validity of the law.

> "Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should and generally is adopted by the United States Supreme Court."
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> *Carey* v. *State of South Dakota* (250 U. S. 118, 39 Sup. Ct. Rep. 403).

> "If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits."
>
> *Harriman* v. *Interstate Commerce Commission* (211 U. S. 407, 29 Sup. Ct. Rep. 115).

> "Were the act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred."
>
> *Knights Templars* v. *Jarman* (187 U. S. 197, 23 Sup. Ct. 108).

But if there could be any doubt on the meaning and effect of the statute it would be removed by the interpretation which the Nebraska Supreme Court has given it in the case at bar. That court, as we have seen, has interpreted the statute as not forbidding a recovery over, and has considered the law of Nebraska to be that such a recovery can be had. While that does not absolutely bind this

court, yet it constitutes, we respectfully submit, "an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment" (*Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 19 Sup. Ct. Rep. 609).

The appellant's original effort to avoid this reasoning consisted in the contention that the Nebraska court, by so construing this statute as to make it constitutional, violated the appellant's vested right to have the statute considered unconstitutional. By an assignment of error (Assignment IV, Rec. p. 107), not discussed in its brief, however, the appellant asserts "that the Supreme Court of the State of Nebraska erred in holding and deciding that the initial carrier * * * has the right to reimburse itself from the connecting carrier committing the injury under the general principle of subrogation, thereby rendering Section 6058, Revised Statutes of Nebraska, 1913, not unconstitutional".

This contention answers itself. How is the appellant to complain of such a mistake even if a mistake was made in this holding of the court? It, as an initial carrier, has been deprived of no property. In fact such a decision gives to it property, rather than takes it away.

> "One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity. *Albany County Supers.* v. *Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Clark* v. *Kansas City*, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 274; *Lampasas* v. *Bell*, 180 U. S. 276, 283, *ante* 368, 21 Sup. Ct. Rep. 368."
>
> *Red River Valley Natl. Bank* v. *Craig* (181 U. S. 548, 558, 21 Sup. Ct. 703, 707).

> "The Supreme Court has repeatedly refused to hear complaints about the constitutionality of a law, except from those who are hurt. *Red River Bank* v. *Craig*, 181 U. S. 548, 558, 21 Sup. Co. Rep. 703, 45 L. ed. 994; *Jeffrey Co.* v. *Blagg*, 235 U. S. 571, 576, 35 Sup. Ct. Rep. 167, 59 L. ed. 364."
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> *Louisville & N. R. Co.* v. *Western Union Telegraph Co.* (249 Fed. 385, 400; *certiorari* denied in *Western Union Tel. Co.* v. *Louisville & N. R. Co.*, 248 U. S. 576, 39 Sup. Ct. 18).

Defendant's further attempt to avoid our contention, is founded on the argument that as "subrogation is not an absolute right, but is a matter of equity only" (Brief of Plaintiff in Error, p. 14), no right of recovery over against the carrier actually at fault is definitely and surely given it, and that therefore there has been a taking of property without due process. Boiled down, the argument, in effect, comes to this—that because subrogation is sometimes spoken of as an equitable remedy ("a matter of equities" would more properly describe it), in applying such remedies courts will act arbitrarily, and grant the remedy only as a matter of grace or whim. Defendant's argument looks like an echo of the worn-out statement that equity does not act according to any general or settled principles.

That argument hardly needs a word to answer it. Even if subrogation were enforceable only in equity, it is long past the time for talking of an "equitable right" as being less certain, as to conception or as concerns remedy, than a "legal right". But as a matter of fact, the doctrine of subrogation is now a matter of "legal right" in any case where, like

the present, all that is needed is a money judgment to make the party whole. In that sort of case an action at law lies as of right, the action for money had and received, and no resort to equity is necessary. That has not been doubted for over a century.

> "A promise was therefore imputed where none confessedly existed, in order to provide a remedy for the party where there was no doubt as to the legal liability; and the legal liability in such cases springs from the equitable obligation, the law courts having borrowed their jurisdiction in these particular cases from courts of equity."
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> *Mathews* v. *Aikin* (1 N. Y. 595);
>
> See also Ames, Lectures on Legal History, 155-6.

The fact is, that this right is as "absolute" as any other rights are. As enforced today, subrogation, as shown above, is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter. Defendant is well within the limitations of the doctrine, so as to demand the remedy as of "absolute" right. Besides, the Supreme Court of Nebraska has said in the very case at bar, that the defendant has the right.

II.

Section 6063, Revised Statutes of Nebraska, 1913, as amended by Laws 1919, c. 134, allowing a reasonable attorney's fee to successful plaintiffs in suits against common carriers on shipments of goods, is constitutional.

The Nebraska Supreme Court has repeatedly construed this statute as providing for the attorney's fees as by way of costs and not as a penalty.

Smith v. *Chi., &c., Ry.* (92 Neb. 719);
Marsh v. *Chi., &c., Ry.* (103 Neb. 654);
See opinion below, Rec. pp. 95-6.

In the late case to which appellant refers (brief, p. 16), *Wagner* v. *Union Stock Yards Co.*, the Supreme Court of Nebraska thus holds (headnote 5):

> "The taxing of an attorney's fee as a part of the costs under the provisions of Section 6063, Rev. St. 1913, as amended by chapter 134, Laws 1919, not being a fine, penalty or forfeiture, may be taxed as a part of the costs in an appropriate action against the director general of railroads."

Furthermore, the Nebraska Supreme Court considers this statute as allowing a reasonable, as distinct from an arbitrary fee, in the particular case.

Smith v. *Chi., &c., Ry.* (*supra*);
Marsh v. *Chi., &c., Ry.* (*supra*);
Opinion, Rec. pp. 95-6.

> "Neither is the imposition of attorney's fees to be considered as a penalty; rather it is to be considered as a part of the costs incurred in

the action, although not so denominated in the statute. The allowance is clearly in the nature of costs. It is not a fixed sum to be recovered as a part of the judgment, but its amount is to be fixed by the court."

Marsh v. *Chi., &c., Ry.* (103 Neb. 654, 658).

The purpose of the statute is thus given in one of the Nebraska decisions to which we have referred:

"This statute provides for the recovery of a reasonable attorney's fee, to be fixed by the court, in actions on a certain kind of claims, viz., claims for loss or damages to property in any manner, or overcharge for freight. It was not the intention of the legislature to make this act applicable to claims for the loss or damage to all property, including property upon or adjacent to a railroad, but only to property received by the carrier as freight for transportation. This is made clear by the requirements of the act that all claims must be accompanied by the bill of lading or duplicate bill of lading or shipping receipt, when returned to the claimant by the carrier, upon the rejection of such claims. Individual claims against common carriers for loss or damage to shipments of freight and for overcharges for freight are in most cases so small that the consignor could not afford to litigate such claims if he were compelled to pay attorney's fees. To remedy this wrong which the shipper might otherwise be required to suffer without redress, it is within the power of the legislature to provide for the recovery by the shipper of a reasonable attorney's fee in a successful action, upon a claim within the class comprehended by the act referred to. This act being applicable to all persons and corporations engaged in the business of common carriers in the state, and applying only to a certain class or kind of

> claims admitting of special legislative treatment, is valid, and not repugnant to the due process of law and equal protection of the law provisions of the fourteenth amendment to the Constitution of the United States."
>
> *Smith* v. *Chi., etc., Ry. Co.* (99 Neb. 719, 727-9).

On its face, and as so construed, this statute is constitutional.

In the first place, it does not create improper classification. It does not strike at a single type of person engaged in the business of common carrier, as a corporation,—as in the case of *Gulf, etc., Railway Co.* v. *Ellis* (165 U. S. 150, 17 Sup. Ct. 255). Obviously this statute is not of that sort. It does not apply merely to corporations which might be engaged in the business of common carrier, but to all common carriers, no matter what they might be in the way of identity or nature. A brief examination of the authorities will demonstrate this obvious proposition.

Let us start with an extreme case (*Gulf, etc., Ry.* v. *Ellis* (165 U. S. 150, 17 Sup. Ct. 255), indicating what may and what may not be done by way of classification in legislation of this sort. In that case a statute of the State of Texas provided, in substance, that if a valid claim against a railway corporation, for personal service or labor, or for damages, or overcharges on freight, or for injuries to stock by trains, were not paid within thirty days, when presented under oath, on recovery of judgment for the full amount of the claim, the plaintiff should be entitled, in addition to the amount of his claim, an attorney's fee of not over $10. This Court held that the statute operated to deprive railroad companies of property without due

process of law, and denied to them equal protection of law, since, as the Texas courts construed it, it amounted to unfair classification, imposing, as it did, a penalty on railroad corporations alone, of all debtors, for failing to pay certain debts. Mr. Justice Brewer, speaking for the Court, said:

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States, the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * *, yet it is equally true that such classification cannot be made arbitrarily * * *. That (attempted classification) must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis * * *. Before a distinction can be made between debtors * * * there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other."
>
> *Gulf, &c., Ry.* v. *Ellis* (165 U. S. 150, 155, 17 Sup. Ct. 255).

But this decision has been greatly limited by later decisions of this court; the point of the distinction lying in the fact that statutes of the class at bar, which apply to all kinds of common carriers as distinct from merely corporations which are common carriers, are in all respects constitutional.

Yazoo, etc. Railway v. *Jackson Vinegar Co.* (226 U. S. 217, 33 Sup. Ct. 40);

Seaboard Air Line v. *Seegers* (207 U. S. 73, 28 Sup. Ct. 28);

Missouri, etc. Railway v. *Cade* (233 U. S. 642, 34 Sup. Ct. 678).

Nor is the purpose to which the statute is devoted unconstitutional. The reason for this statute has been assigned by the Nebraska Supreme Court in the passages from its opinions quoted above; and that reason has been upheld by this court in its decisions above cited.

In *Yazoo, etc., Ry.* v. *Jackson Vinegar Co.* (226 U. S. 217, 33 Sup. Ct. 40), a statute of Mississippi provided: "Railroads, corporations and individuals engaged as common carriers in this state are required to settle all claims for lost or damaged freight which has been lost or damaged between two given points on the same line or system, within sixty days from the filing of written notice of the loss or damage with the agent at the point of destination; and where freight is handled by two or more roads or system of roads and is lost or damaged, claims therefor shall be settled within ninety days from the filing of written notice thereof with the agent by the consignee at the point of destination. A common carrier failing to settle such claims as herein required shall be liable to the consignee for $25 damage in each case in addition to actual damage, all of which may be recovered in the same suit. Provided that this section shall only apply when the amount claimed is $200 or less." This statute was upheld; the Court, speaking through Mr. Justice Van Devanter, saying:

> "As applied to such a case, we think the statute is not repugnant to either the due process of law or equal protection clause of the Constitution, but on the contrary, merely provides a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment."
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> *Yazoo, &c. Ry.* v. *Jackson Vinegar Co.* (226 U. S. 217, 33 Sup. Ct. 40, 41).

In *Seaboard Air Line Ry.* v. *Seegers* (207 U. S. 73, 28 Sup. Ct. 28), a South Carolina statute imposed a penalty of $50 in favor of plaintiffs recovering their full claims in suits against common carriers for damages to property while in their possession, provided the claim was not settled within forty days after presentment to the defendant. This Court, in sustaining the statute, said:

> "We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the nonpayment of debt. As the supreme court of South Carolina said in *Best* v. *Seaboard Air Line R. Co.*, 72 S. C. 479, 484, 52 S. E. 223, 225: 'The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary.' * * * *The classification is based solely upon the nature of the business, that being of a public character.* * * * While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. * * * Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, *but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions.*" (Italics ours.)
>
> *Seaboard Air Line Ry.* v. *Seegers* (207 U. S. 73, 77, 79, 28 Sup. Ct. Rep. 28).

The statute involved in *Gulf, C. S. F. Ry. Co.* v. *Ellis* (*supra*) was altered by the Texas legislature to apply to any person, and in that form and though still construed by the state courts of Texas as a statute to enforce the payment of small claims, it came before this Court again. In its new form the constitutionality of the statute was upheld. The claim that the statute was repugnant to the "equal protection" clause of the Fourteenth Amendment to the United States Constitution, because successful defendants were discriminated against, in that they were not allowed attorney's fees, was answered by this Court thus:

> "This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction, and bringing the proper parties before it, as well as the burden of proof upon the main issues, and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fees as a part of the costs."
>
> *Mo., &c., Ry.* v. *Cade* (233 U. S. 642, 34 Sup. Ct. 678, 681).

The distinction between these cases and the original case of *Gulf, etc. Railway Co.* v. *Ellis* (*supra*) seems to be quite clear.

In *Yazoo, etc., Ry.* v. *Jackson, etc., Co.,* the statue included within its scope *all* common carriers, and not merely railroads. Such inclusion avoids the objection raised to the statute in *Gulf, etc., Ry.* v. *Ellis,* indicated by the Court when it said, "Further the penalty is imposed, not upon all corporations charged with the *quasi* public duty of

transportation, but only on those charged with a particular form of that duty" (*Gulf, etc., Ry. Co.* v. *Ellis*, 165 U. S. 150, 157).

The classification which would apply to common carriers in such a situation as arose in the instant case, is validly based upon the fact that the business is of a public character. Again, the great objection to the validity of the statute in the Ellis case—that it was a statute covering railroads alone for failing to pay their debts—is avoided by the fact, as indicated in the opinion from *Best* v. *Seaboard Air Line R. R. Co.*, quoted with approval in *Seaboard Air Line* v. *Seegers* (*supra*), that the statute looks rather to prompt settlement of valid claims against carriers.

The same distinction is made apparent by decisions on statutes of a similar general nature.

Missouri, etc., Railway Co. v. *May* (194 U. S. 267, 24 Sup. Ct. 638);

Atchison, etc., Railway Co. v. *Mathews* (174 U. S. 96, 19 Sup. Ct. 609).

In *Missouri, etc., Railway* v. *May* (*supra*), a statute allowed the owner of any farm abutting on a railway right of way, to recover a penalty of $25 from the owner of the railway if the latter permitted Johnson grass to go to seed on the right of way, provided the farm had been kept clear of Johnson Grass. It was contended that this particular subjection of railroad companies to a liability not imposed on other owners of land on which this particular kind of grass was allowed to grow, was so arbitrary as to amount to a denial of the equal protection of the laws. The answer of the court follows:

> "When a state legislature has declared that, in its opinion, policy requires a certain meas-

> ure, its action should not be disturbed by the courts under the Fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. Approaching the question in this way we feel unable to say that the law before us may not have been justified by local conditions. * * * It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down the pests, the railroad companies have done nothing in a matter which concerns their neighbors only * * * Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."
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> *Mo., &c., R. Co.* v. *May* (194 U. S. 267, 24 Sup. Ct. Rep. 638).

In *Atchison Ry. Co.* v. *Matthews* (174 U. S. 96, 19 Sup. Ct. 609), a Kansas statute allowing a reasonable attorney's fee to successful plaintiffs in actions against railroad companies for damages due to the negligent escape of fire, was sustained by this Court. Mr. Justice Brewer said, for the Court:

> "The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. * * * It is true that the Ellis Case was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock and the protection of the stock from moving trains would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against rail-

road corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute and its purpose given by the Supreme Court of Texas. * * * Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. It is the essence of a classification that upon the class are cast duties and burdens different from those resting on the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damages which it has done, but twice that amount. If it succeeds it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock, it could, under no circumstances, recover any more than the value of that stock. So it may be said that in matter of liability, in case of ligation it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

Atchison, &c., Ry. v. *Matthews* (174 U. S. 96, 19 Sup. Ct. 609).

Here it is indicated that had the statute in *Gulf, etc., R. Co.* v. *Ellis, supra,* been designed for the better protection of stock, it might very well have been aimed at railroads alone. Though all persons

are under a duty to take care not to injure stray cattle, the greatest violations of that duty are to be found among railroads, and hence special treatment of them is justified, even though it result in the inequality to them, so far as litigation is concerned, which was suggested in the opinion of the Court in *Atchison, T. S. F. R. Co.* v. *Matthews, supra.* So also because of the dangerous instruments they use, they may be made the subject of special legislation as to their liability for spreading fire.

Other examples of statutes which imposed attorney's fees on unsuccessful defendants and yet were upheld because reasonable as to the amount permitted to be recovered as attorney's fees, and based on fair classification are: *Fidelity Mut. Life Ass'n.* v. *Mettler* (185 U. S. 308, 22 Sup. Ct. Rep. 662), (statute directed against life and health insurance companies alone), *Farmers' & M. Ins. Co.* v. *Dobney,* (189 U. S. 301, 23 Sup. Ct. Rep. 565), (statute directed against fire insurance companies alone, and where the property insured became a total loss).

Defendant cites the case of *Truax* v. *Corrigan,* 42 Sup. Ct. 124 (Brief of plaintiff in error, p. 15), as opposed to our contention. Nothing that was said in that case, and especially in that portion of the opinion quoted by the defendant, militates against our position. "All men are equal before the law", but all that the United States Constitution requires for equal protection is that there be equality among a class, founded on a reasonable distinction between it and other classes. The decided cases show that that alone, and not identity of privileges and rights among all persons, is all that the statement, "All men are equal before the law", means.

"What opportunity did the Railroad have of

selecting out of the 105 causes of action involved in this case those few meritorious ones which the jury said plaintiff was entitled to recover and subtract from those the causes of action which the Supreme Court said were not suppported by proof and make tender of the amount which the Supreme Court found finally to be due? It was impossible. A statute which requires that demands the unreasonable and the impossible. It does not observe the rudiments of fair play. It denies due process of law and equal protection of the law and is void" —thus argues the defendant in its brief (pp. 28, 29).

A portion of an opinion of this court completely answers such argument:

> "Further the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what is delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment and the shipper may not know what was in fact delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and with less delay and expense than any one else, and for the adjustment of loss or damage to shipments within the state, forty days cannot be said to be an unreasonably short length of time. It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time cannot be

adjudged unconstitutional as a purely arbitrary classification."

Seaboard, etc., Ry. v. *Seegers* (207 U. S. 73, 28 Sup. Ct. 28).

Nor is the situation altered by the fact that the loss may have occurred on the line of a connecting carrier. Still the fact remains that the defendant was in a better position to ascertain the facts than was the plaintiff. Upon this obvious fact rests the legislation which permits the shipper to sue the initial carrier.

"In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged, and had no access to the records of the connecting carriers who, in turn, had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed. This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate."

Atl. Coast Line v. *Riverside Mills* (219 U. S. 186, 31 Sup. Ct. 164).

The appellant argues that the time limit allowed for investigation is unreasonable. This contention will not hold. In *Seaboard Air Line R. Co.* v. *Seegers, supra*, a statute imposing what it frankly called a "penalty" for refusal of a just claim within forty days after the presentment of the claim was upheld. In the instant case the additional recovery is not so much a penalty as reimbursement for the cost of the services of an attorney. In the instant case, like that in the case just cited, the shipment was wholly intrastate.

Accordingly, if forty days was in *Seaboard Air Line R. Co.* v. *Seegers* (207 U. S. 73, 28 Sup. Ct. 28) held not to be an unreasonable time for the carrier to settle, so much the more is the statute in the instant case reasonable, when it allows the carrier sixty days to adjust the claim—half as much again as was allowed in the case just quoted. In *Missouri, K. & T. R. Co.* v. *Cade,* additional recovery, equal to reasonable attorney's fees and costs of suit, was allowed and upheld under a statute giving the defendant but thirty days to adjust the claim after presentment.

The appellant attempts to distinguish the decisions of this court which we have above discussed, on the ground that in each of those cases the statute under consideration allowed recovery only in the case of the claim of a relatively small amount. The appellant argues that the present statute, by allowing the attorney's fee on any claim, large or small, is not within the reason of those decisions.

In this the appellant wholly errs. This court has made no such distinction, and has upheld such statutes without regard to any such limitation. In *Atchison, &c., Ry.* v. *Mathews* (174 U. S. 96, 19 Sup. Ct. 609), which we have cited above, the statute, like the one at bar, imposed no limit on the amount of the claim. Furthermore, the validity of any such legislation does not depend on any such circumstance.

The reasoning of this court, as gathered from its decisions above cited, is that the statute allowing an attorney's fee in a claim suit against a railway "merely provides a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special legislative treatment" (*Yazoo, etc. Railway Co.* v. *Jackson*

Vinegar Co., 226 U. S. 217, 33 Sup. Ct. 40). The classification of claims as admitting of special legislative treatment is described by this court as "based solely upon the nature of the business, that being of a public character" (*Seaboard Air Line Railway* v. *Seegers*, 207 U. S. 73, 77, 28 Sup. Ct. 28). Further, "the matter to be adjusted is one peculiarly within the knowledge of the carrier * * *. The carrier can determine the amount of the loss more accurately and with less delay and expense than any one else." The statute "puts in one class all engaged in business of a special and public carrier, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for failure to perform that duty within a reasonable time" (*Seaboard Air Line Railway* v. *Seegers*, *supra*). The argument that a statute would be constitutional only as applying to small claims bears inverse ratio to the common sense of the situation. What this court did in upholding these statutes was to justify them even when limited to small claims, rather than to limit the constitutionality of the statute to the cases of small claims. That appears from its language in the case last cited that "while in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this" (*Seaboard Air Line Railway* v. *Seegers* (*supra*)). By this the court did not say that only such statutes as apply to small cases would be valid; rather what it said was that such a statute would be valid, even though limited to small claims, because those specially need protection. That is quite a different thing

from saying that large claims need no protection. The ultimate point is that a carrier is engaged in public duties, and that a statute of this class simply imposes another public duty upon him, and is justified in that regard because of the fact that the carrier has peculiar knowledge which the shipper lacks. It is just as difficult to collect a large claim as a small one; each claim must in the end depend for its validity upon the establishment of facts, and in each case the facts are peculiarly within the knowledge of the carrier. Therefore, there would be no reason to uphold the statute simply on basis of the size of the claim. In final analysis, that would be discriminating against the holder of a large claim in favor of the holder of a small claim.

Although it is not always easy to say what is and what is not equal protection of the laws, the decided cases clearly indicate that Section 6063, Revised Statutes of Nebraska, 1913, is not a deprivation of equal protection of the laws. In a few words, the statute is valid, because though directed against a class which have already undertaken special duties to the public and whose business is of a public nature, it includes all of that class, producing equality among the class. Once establish a valid classification, and equality among the class, and not identity of privileges and rights among all persons, is all that is required by the United States Constitution. It is submitted that the test of validity is well met by the statute in the instant case.

Nor does this statute deprive the appellant of that due process of law to which it is entitled. The Nebraska courts, as we have seen, treat the allowance of attorney's fees as part of the costs. The

plaintiff, if he recovers below, is allowed a reasonable attorney's fee; if then there is an appeal, and the plaintiff succeeds therein, another attorney's fee is allowed him,—costs above and below, that is what the statute allows. The statute does not fix an arbitrary fee. On the contrary it requires the court to fix it; and this means, as appears from the Nebraska decisions already cited, that the fee fixed will be reasonable as distinct from arbitrary. The fixing of the fee is a judicial, not a legislative process. The attorney's fee thus fixed is nothing but a detail of the system of costs, with which American courts, as well as those of England, have long been familiar.

Nor is it unusual or unjust for a statute to provide that in certain classes of cases the plaintiff may be allowed counsel fees while the defendant may not. For example, the New York Code allows, and for several generations has allowed, such fees exclusively to the plaintiff in no less than four kinds of actions, and consequently no defendant can apply for them.

> *Williams* v. *Hernon* (13 Abb. Pr. 297);
> 5 Wait's New York Practice, p. 4610;
> 15 C. J., tit. "Costs", p. 154.

Certainly, from a constitutional standpoint nothing can be made of this circumstance.

> "Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit'. So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other,

it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle."

Mo., &., Ry. v. *Cade* (233 U. S. 642).

All that is necessary for the validity of the statute is that it does not fix a fee which is so grossly disproportionate to the recovery as to amount to confiscation. What that means will appear by a reading of *Kansas City Southern R. Co.* v. *Anderson* (233 U. S. 325, 34 Sup. Ct. 599). There a statute, exacting double liability and an attorney's fee from a railway company refusing to pay for the killing of live stock by one of its trains within thirty days after the owner's demand and after a trial establishing the justice of the demand, was held not repugnant to the due process clause of the Constitution. The Court, through Mr. Justice McKenna, said:

"In that case (referring to *St. Louis R. Co.* v. *Wynne*, 224 U. S. 354, 32 Sup. Ct. 493), however, there was a demand for $500 damages. The railway company refused to pay it. The owner sued for $400 and recovered a verdict for that amount, and the court, deeming the statute applicable, gave judgment for double that amount and an attorney's fee of $50. * * * This court reversed the judgment, holding that so far as the statute was held to justify the imposition of double damages where there was demand for one sum and an action and judgment for less, it was void. The question was expressly reserved whether such would be the decision if the recovery corresponded to the demand; * * * That question is involved in the present case, and we think it is determined by *Seaboard Air Line R. Co.* v. *Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct.

Rep. 28, and *Yazoo & M. Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 5 L. ed. 193, 33 Sup. Ct. Rep. 40. In both cases statutes (South Carolina and Mississippi) were sustained. Each provided for failure to settle claims after certain time after demand, the penalty being $50 in one statute and in the other $125, in addition to the actual damages. * * * In the other case, it was said, the railroad company has not been penalized for failing to accede to an excessive or extravagant demand, but for failing to make reasonably prompt settlement of a claim which, upon due inquiry has been pronounced just in every respect."

K. C. So. Ry. Co. v. *Anderson* (233 U. S. 325, 34 Sup. Ct. 599, 600).

As we have already shown, the statute in the case at bar has been construed by the highest court of Nebraska as being in the nature of a provision for costs as distinct from a penalty, and as allowing no further fee than what would be reasonable in regard to the amount of the recovery. *Smith* v. *Chi., etc., Ry.* (92 Neb. 719); *Marsh* v. *Chi., etc., Ry. Co.* (103 Neb. 654).

On the trial of the case at bar, the trial court allowed a $600 counsel fee (Rec. p. 34) but the Nebraska Supreme Court cut the amount down to $200 (Op. Rec. p. 96).

Thus the appellant while suffering a $600 allowance for attorney's fee against it in the trial court, succeeded in the Appellate Court in reducing this amount by two-thirds, because the Nebraska Supreme Court followed the rule of that state which allows only a fee reasonable when compared with the recovery.

It is true that the Supreme Court of Nebraska allowed $100 additional attorney's fees to the

plaintiff for the appeal to that court, although it found the appeal on the part of the defendant justified—*but justified in part only.* In allowing such additional fee, the court did not penalize the defendant for taking a just appeal, but rather, the plaintiff was allowed the additional fee, by way of reimbursement, and with the total amount allowed still bearing a reasonable relation to the amount recovered, because of the defendant's continued refusal to pay a just claim. If it be said that the Supreme Court of Nebraska failed to specifically state that the additional attorney's fees were allowed the plaintiff for services in connection with that part of the defendant's appeal which was not justified, it is answered, that as every reasonable presumption in favor of constitutional validity will be indulged in by this court, as shown *supra,* it will be presumed that the Nebraska Court allowed the additional attorney's fees for services in connection with that part of defendant's appeal which was not justified, and that part alone.

There can be no doubt that defendant was given all that is required for due process by *Truax* v. *Corrigan* (42 Sup. Ct. 124), which defendant cites as opposed to our position (Brief of plaintiff in error, p. 15).

Aside from that, the cases the appellant cites deal with an entirely different situation. In those cases the statute imposed not only an attorney's fee, but something more besides, double damages (*St. Louis, &c., Ry.* v. *Wynne,* 224 U. S. 354, 32 Sup. Ct. 493; *Chi., &c., Ry.* v. *Polt,* 232 U. S. 165, 34 Sup. Ct. 301) or so-called liquidated damages (*Mo. Pac. Ry.* v. *Tucker,* 230 U. S. 340, 33 Sup. Ct. 961). In the present case the statute allows only an attorney's fee and, as the Court below says, does not

intend "that the railroad company should pay double damages" (Rec. p. 96). Such a statute as ours is not in the same class with a statute which imposes $500 "liquidated damages" for each overcharge (even though it should be only $3.02), in addition to an attorney's fee (*Mo. Pac. Ry.* v. *Tucker, supra*), or a statute which doubles the actual recovery and also allows an attorney's fee (*St. Louis, &c., Ry.* v. *Wynne, supra; Chi., &c., Ry.* v. *Polt, supra*). In those cases the plaintiff not only would get his attorney's fee, but in addition a sum, by way of double or "liquidated damages", representing neither the loss he sustained nor the legal expense to which he had been put. Under the statute at bar, on the contrary, the defendant is not penalized by having to pay double if he "guesses wrongly" (see Appellant's brief, pp. 27-8). Here, the defendant, if it "guesses wrongly", pays only the plaintiff's actual loss, plus attorney's fees on the sum recovered in excess of that tendered in settlement by the carrier.

The carrier under such a statute as is at bar doesn't face the necessity of guessing correctly what damages a jury will award, with the alternative of being compelled to pay double liability and attorney's fees on the whole sum found as damages by the jury. Under the statute in the case at bar, the carrier can make its offer of settlement, and from thence on the plaintiff can have no counsel fees concerning that part of a verdict which represents the amount tendered in settlement is absolutely cut off. Even though the plaintiff's demand in a given case be exorbitant, such tender by the carrier will not be futile, and the carrier cannot suffer a confiscation in the event that the jury find for a larger sum than was tendered.

The whole thing is dealt with as if the claim were

divided into two claims. One, represented by what the carrier tenders in settlement, is settled at par. No "penalty" of any sort is attached. In the other claim, represented by the sum in excess of that tendered which the jury find to be unjustly withheld by the carrier, the claimant is allowed reimbursement, and that but poor reimbursement often, for the expenditures for the services of an attorney in collecting it.

The additional recovery, under the statute at bar, is not arbitrarily imposed. Neither is *any* sum asked as attorney's fees granted. The statute's own requirement of reasonableness, a foundation stone of the Fourteenth Amendment, holds any excessive demands in check. And the Nebraska Supreme Court recognizes this, as appears from the cases which we have cited above. Furthermore, the counsel fee is imposed in a judicial proceeding, after the unsuccessful defendant has had his day in court and been found to have refused to pay a just claim. No better example of fair treatment can be found than the action of the Supreme Court of Nebraska in cutting down the amount allowed as attorney's fees in the instant case, so as to bear a reasonable relation to the amount recovered, even though the attorney's fees may amount to more than the successful plaintiff will have to pay. Under such a construction the additional recovery is not even reimbursement to a plaintiff, much less a penalty on a carrier.

Viewed in this light the contention that there should be no attorney's fee unless the plaintiff proved all of the counts of the complaint, is baseless. The defendant got the benefit of the situation by a reduction of the counsel fee from $600, as allowed on the trial, to $200.

The defendant argues that as applied, the Statute

allows double or treble damages, and cites in support of its contention a very late Nebraska case (*Wagner* v. *Union Stock Yards Company,* Sup. Ct. Nebraska Case No. 21698, decided Feb. 16, 1922). We print the opinion and headnotes as Exhibit A to this brief. No point was involved in this case, except whether a counsel fee on appeal should be allowed against the Director General of Railroads. The Court held in the affirmative for reasons which we have elsewhere noted in this brief (*supra,* p. 14). No contention was made as to any lack of proportion between the allowance of fee and the amount of recovery. As the carrier was satisfied with the allowance, raising only the question of law whether an allowance should be made at all, this case would not be viewed as an authority on any point involving the constitutionality of the statute.

The question before this Court is whether the defendant has been deprived of property without due process of law, or of the equal protection of the law. It is not whether X or Y were so deprived. Time enough to consider possible applications of the statute, when the parties whose rights may have been violated, are before this Court.

III.

The judgment of the Supreme Court of Nebraska should be affirmed.

Dated March 16, 1922.

Respectfully submitted,

GARRARD GLENN,
WILLIAM B. WALSH,
Counsel for Defendant in Error,
42 Broadway,
New York City.

Exhibit A.

WAGNER *v.* UNION STOCK YARDS COMPANY.

No. 21698. Opinion filed February 16, 1922.

1. The municipal court has jurisdiction to try a case and enter judgment against defendant, notwithstanding the adjournment of the case for more than 90 days, where the adjournments were on the application of the defendant, or by consent of the parties.

2. Where, in an action pending in the municipal court, continuances were had beyond the period of 90 days by agreement of parties, and, on a date to which the case had been continued by agreement, the record shows, "this cause is continued indefinitely by agreement of the attorneys to be taken up at such time as attorneys agree upon, or fixed by the court for trial", *held* that, under such stipulation, the court had jurisdiction to try the case and enter judgment on a date fixed by the court.

3. Where, in such case, the municipal court on the date for which a case is set for trial is actually engaged in the trial of another case, and, for that reason, adjourns the case until the following day, jurisdiction is not lost.

4. Evidence examined, and held sufficient to sustain verdict.

5. The taxing of an attorney's fee as a part of the costs under the provisions of section 6063, Rev. St. 1913, as amended by chapter 134, Laws 1919, not

being a fine, penalty or forfeiture, may be taxed as a part of the costs in an appropriate action against the director general of railroads.

6. On motion of plaintiff the name of James C. Davis, director general and agent, is substituted as defendant, instead of Walker D. Hines, director general of railroads.

Heard before Morrissey, *C. J.*, Aldrich, Flansburg and Rose, *JJ.*, Brown and Eldred, District Judges.

ELDRED, District Judge.

This is an action brought in the municipal court of Omaha, Douglas county, Nebraska, to recover damages for the loss of one hog from a shipment of mixed live stock made by the plaintiff from Hooper, Nebraska, to South Omaha, Nebraska; the shipment being consigned to the Farmers Union Live Stock Commission Company. In the municipal court, judgment was rendered in favor of the plaintiff and against the defendant director general of railroads, and in favor of the defendant Union Stock Yards Company. The defendant director general of railroads appealed the case to the district court for Douglas county, where the judgment was again in favor of the plaintiff, and the defendant has brought the case here for review.

In the district court, the director general moved that the action be dismissed, for the reason that the municipal court did not have jurisdiction at the time it rendered judgment therein. The overruling of this motion is the principal error urged.

The transcript shows that the plaintiff filed a bill of particulars in the municipal court June 17, 1919, and that summons was issued returnable

June 24, 1919. After several previous adjournments the record shows:

"October 7, 1919, this cause is continued indefinitely by agreement of the attorneys to be taken up at such time as attorneys agree upon, or fixed by the court for trial."

"December 10, 1919, set for trial December 17, 1919, at 1:30 P. M., by agreement of attorneys."

"December 17, 1919, at 2 P. M., the parties appeared and cause came on for trial. * * * The defendant moved court to dismiss action for reason that the evidence is not sufficient. Motion taken under advisement until December 18, 1919, at 9 A. M."

"December 18, 1919, at 9 A. M., the attorneys for the plaintiff and the defendants appeared and motion was overruled, and the cause continued to January 19, 1920, at 2 o'clock P. M., to take further testimony and for further trial, on the request of the plaintiff."

"January 19, 1920, at 2 o'clock P. M., the court being engaged in the trial of another case, * * * this cause is continued to January 20, 1920, at 2 P. M."

"January 20, 1920, at 2 P. M., this cause came on for further hearing of testimony * * * and for submitting to the court all the evidence and arguments of the attorneys. The court took the case under advisement until January 22, 1920, at 2 o'clock P. M."

January 22, 1920, at 2 P. M., the judgment was rendered by the municipal court from which appeal was taken.

The municipal court did not lose jurisdiction to enter a judgment in this case, notwithstanding the

adjournment of the case for more than 90 days, where such adjournments were on application of the defendant, or by consent of the parties. *Fischer* v. *Cooley*, 36 Neb. 626; *In re* Estate of Green, 102 Neb. 306.

It is apparent that all adjournments of the case, after the expiration of the ninety-day period, and prior to January 20, 1920, were made by the consent of both parties. It would also seem that the defendant participated in the proceedings had on January 20, as the record indicates that the case was submitted to the court on "the evidence and arguments of attorneys".

Where the record shows the jurisdiction of the municipal court has once attached, as in this case, the presumption that subsequent proceedings were regular will be indulged in until the contrary is shown. *Kuker* v. *Beindorff*, 63 Neb. 91; *In re* Estate of Green, 102 Neb. 306. The record indicating that the attorney for the defendant participated in the proceedings had on January 20, 1920, jurisdiction was not lost. Had the defendant not appeared on the date to which the case was adjourned, still, it appearing that the court was on the 19th day of January, 1920, actually engaged in the trial of another case, the adjournment of the case, for that reason, until the following day, would be authorized. *In re* Estate of Green, *supra*.

There is another reason why the court did not lose jurisdiction in this case. On October 7, 1919, the parties agreed in open court that the cause should be continued indefinitely to be taken up at such time as the attorneys agreed upon, "or fixed by the court for trial". If the parties did not specifically consent to the adjournment of the case to the date on which the trial was finally completed, it was at least a date "fixed by the court for trial".

The defendant, having made such agreement, ought not now be heard to complain of the action of the court in pursuance thereof.

It is contended that the evidence was not sufficient to sustain the verdict; that it did not appear that the plaintiff was the owner of the hog that was lost; nor that it was lost by the defendant. These were questions of fact, properly submitted to the jury. We have examined the record and conclude that the evidence was sufficient to sustain the verdict.

Some complaint is made of the rulings of the court in excluding testimony offered to show other shipments from the station at Hooper, on the date in question, to the same consignee at South Omaha, and the possibility of plaintiff's hog becoming intermingled with one of such shipments. Such evidence was immaterial under the issues in this case, and was properly excluded.

Finally, it is urged that the court had no authority to tax an attorney's fee as part of the costs; that the statutes of Nebraska relating to the taxation of attorney's fees does not apply to cases where the director general of railroads is defendant, on the theory that the taxation of such fee amounts to a fine, penalty, or forfeiture. General order No. 50 is cited, which provides for the bringing of actions growing out of the possession, use, control or operation of the railroads against the director general, but that the order shall not apply to actions, suits or proceedings for the recovery of fines, penalties or forfeitures. That the taxation of attorney's fees under the provisions of section 6063, Rev. St. 1913, as amended by chapter 134, Laws 1919, is not a fine, penalty or forfeiture, and that a reasonable attorney's fee may be properly taxed as part of the costs has been determined in *Nye-Schneider-Fowler Co.*

v. *Chicago & N. W. R. Co.*, 105 Neb. 151; 179 N. W. Rep. 503. *March & Marsh* v. *Chicago & N. W. R. Co.*, 103 Neb. 654; *Smith* v. *Chicago, St. P., M. & O. R. Co.*, 99 Neb. 719. No satisfactory reason has been suggested why an attorney's fee should not be taxed as a part of the costs in this case against the defendant director general. An attorney's fee of $50 is allowed for plaintiff's attorney in this court.

Plaintiff has also presented a motion to substitute as defendant the name of James C. Davis, director general of railroads and as agent, under section 206 of the federal transportation act of February 28, 1920 (41 U. S. St. at Large, ch. 91, p. 461) instead of Walker D. Hines, director general of railroads. This motion is sustained.

The judgment is

AFFIRMED.

Flansburg, *J.*, dissents.

The State of Nebraska, ss.

I, H. C. LINDSAY, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 16th day of February, 1922, with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 14th day of March, 1922.

H. C. LINDSAY,
Clerk.

(SEAL)

By P. F. GREENE,
Deputy.

might have ascertained and so protected itself by a tender, and where the trial lasted four days, an attorney's fee of $200 for service in the trial court, and 7% interest on $800 ultimately recovered, was not an excessive penalty. P. 45. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt*, 232 U. S. 165, distinguished.

5. But imposition on the carrier of an additional attorney's fee of $100, fixed under the statute upon the basis of the service rendered, time and labor bestowed, and recovery secured, by the claimant's attorney in resisting an appeal by which the carrier obtained a large reduction of an excessive judgment, was unconstitutional. P. 46.

105 Neb. 151, reversed in part and affirmed in part.

ERROR to a judgment of the Supreme Court of Nebraska, affirming with reductions a judgment for damages, interest, and attorney's fees, and taxing a further attorney's fee for services in that court, in an action against a railroad company for loss and injury of live-stock freight.

Mr. Wymer Dressler, *Mr. F. W. Sargent* and *Mr. T. P. Littlepage*, for plaintiff in error, submitted.

Mr. Garrard Glenn, with whom *Mr. William B. Walsh* was on the brief, for defendant in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

In this case, the constitutional validity of two statutes of Nebraska is questioned, the first subjecting the initial railroad of two connecting roads, receiving freight, to liability for safe delivery by the other, and the second making every common carrier liable for a reasonable attorney's fee in the court of first instance and on appeal, for collection from it of every claim for damage or loss to property shipped, not adjusted within 60 days, for intrastate shipments.

The Nye Schneider Fowler Company, defendant in error, is a corporation of Nebraska, at Fremont, Nebraska,

engaged in the business of bringing hogs into the State and shipping them to South Omaha for sale in the stockyards there. It brought this suit against the plaintiff in error, a common carrier, to recover damages in the sum of $2,097.21 and $900 attorney's fees, for loss or injury to hogs shipped in 105 intrastate shipments, averring due presentation of such claims and the refusal of the company to pay any amount whatever on them. The jury returned a verdict of $802.27, with interest at 7%, as provided in the statute. On motion, the court fixed the reasonable attorney's fees in the suit at $600, as part of the costs, and judgment for verdict and costs was accordingly entered. By the Supreme Court of the State, to which the defendant company appealed the cause, a remittitur was required and consented to for $209.01 on the amount recovered for loss and damage, and the fee of $600 taxed as costs was reduced to $200, but the Supreme Court taxed the plaintiff in error with an attorney's fee of $100 for services in the Supreme Court and judgment was entered accordingly. The questions made involved separate statutes and we shall take them up in order.

First. Section 6058 of the Revised Statutes of Nebraska, 1913, provides as follows:

"Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, the company owning either of such roads receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped."

It is objected that this imposes on one railroad liability for the default of another without providing reimbursement by that other and so deprives the one of its property

without due process of law. But the Supreme Court of Nebraska has declared in this case that, in such a case under the statute, the initial carrier has a right of reimbursement under the general principle of subrogation. This conclusion is sound and is supported by *Texas & Pacific Ry. Co.* v. *Eastin & Knox*, 100 Tex. 556, and the general principle involved finds support in *Fisher* v. *Milwaukee Electric Ry. & Light Co.*, 173 Wis. 57; *Arnold* v. *Green*, 116 N. Y. 566, 571; *Syracuse Lighting Co.* v. *Maryland Casualty Co.*, 226 N. Y. 25, and *Holmes* v. *Balcom*, 84 Me. 226. Counsel for the plaintiff in error contend that the legislature has granted no such right of subrogation in this statute, that it is not a right but purely a matter of equity under the circumstances. We can not follow this distinction. We have here a construction of this statute by the Supreme Court of the State, in which that tribunal holds that, under all the circumstances to which this statute can apply, subrogation does exist. The initial carrier is, therefore, certainly protected within the jurisdiction within which the statute operates, and, as no doubt can arise as to the enjoyment of the right, it is immaterial whether it was originally founded on the common law or was developed in the broader justice of equity jurisprudence.

Second. Authority for taxing of attorney's fees as part of the costs in such cases is founded in c. 134, Laws of Nebraska, 1919, amending § 6063, Revised Statutes, 1913, which reads as follows:

"Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the State of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of shipment or shipments between points without and points within the state, after

such claim, stating the amount and nature thereof accompanied by the bill of lading or duplicate bill of lading or shipping receipt showing amount paid for or on account of said shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent, or the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided, within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent per annum from the date of filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction, and in the event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts: Provided, in bringing suit for the recovery of any claim for loss or damage as herein provided if consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such consignee or consignor, or real party in interest, shall not recover the interest penalty or attorney's fee herein provided."

The Supreme Court of the State has held that provision for attorney's fees in this section is in the nature of reimbursement of costs and not a penalty. *Smith* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 99 Neb. 719; *Marsh & Marsh* v. *Chicago & Northwestern Ry. Co.*, 103 Neb. 654. But this does not meet the objection pressed on us.

These are costs imposed on the defeated defendant in the litigation, but not on the defeated plaintiff. This is an inequality, and the question is whether it is a just discrimination and one which the legislature may make and not take the defeated defendant's property without due process or deny it the equal protection of the law. We have considered in our more recent decisions the constitutional validity of inequalities of this general character as between claimants and common carriers created by state legislation, and it may perhaps be worth while to review the decisions to see what general rule runs through them, with a view of applying it to the case before us.

In the first of these cases, *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, a defendant railroad company attacked a statute of Texas under which it had been required to pay an attorney's fee to the plaintiff. The statute provided that any person having a claim for personal services, for overcharges for freight, or for claims for stock killed if it did not exceed $50, which was duly presented and not settled in 30 days, might, if he recovered the full amount in a suit, recover also an attorney's fee not exceeding $10, if he had an attorney. This Court, three judges dissenting, held that the statute denied the equal protection of the laws to railroads, because it was only a penalty to compel them to pay their debts, and that to single them out as a group of general debtors was not just classification.

In *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, a statute relating to the liability of railroads for damages for fire caused by their negligent operation, allowed the plaintiff if he recovered a reasonable attorney's fee. This was held a valid classification of defendants, because it was a police measure to prevent fire likely to be caused by operation of railroads and the attorney's fee stimulated care to prevent it.

In *Seaboard Air Line Ry.* v. *Seegers*, 207 U. S. 73, a state statute imposed a penalty of $50 on all common car-

riers for failure to adjust damage claims within 40 days, if in the subsequent litigation the plaintiff recovered the full amount claimed. The statute was sustained in a case where the claim was $1.75. It was held not to be a statute imposing a penalty merely for the non-payment of debts, or against railroad corporations alone, as in the *Ellis Case*, but one based solely upon the nature of the business peculiarly within the knowledge of the carrier, who could determine the loss more accurately and with less delay than the plaintiff. It was said that the design was to secure a reasonably prompt settlement of proper claims, and especially small claims which most need such penal provisions to protect them.

In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne*, 224 U. S. 354, a state statute required railroad companies to pay claims for livestock killed or injured by their trains, within 30 days after notice, with a penalty, for failure to do so, of double damages and attorney's fee, if claimant recovered what he sued for. The plaintiff had made a claim for $500 for the killing of two horses by defendant's train. On refusal, suit was brought for $400 and recovery had for that amount. It was held that, to apply the statute, as the state court did, to a case in which plaintiff had demanded more than he sued for, made an arbitrary exercise of power and deprived defendant of its property without due process of law.

In *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U. S. 325, the same statute which was held invalid in the *Wynne Case* was again before the Court for consideration as applied to a case where plaintiff had not demanded more than he sued for and recovered, and the validity of the statute was upheld.

In *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, the statute required every common carrier to settle claims for lost or damaged

freight within 60 days and made it liable for $25 damages in each case in addition to the actual damages, but limited the penalty to claims of less than $200. The claim was $4.76, and there was a recovery of the claim and penalty. Such a statute was held a reasonable incentive to the prompt settlement without suit of just demands of a class admitting of special legislative treatment. It was objected to the statute that it intended the assessment of a penalty, whether the recovery was less than the claim or not. But the Court refused to consider the objection, on the ground that it sufficed to hold that, as applied to cases like those before it, the statute was valid; and that it would not deal with imaginary cases or speculate on what application the state court would make of the statute in another class of cases.

In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt*, 232 U. S. 165, the state statute made a railroad company absolutely responsible for loss of property destroyed by fire communicated from its locomotives, and provided that, unless it paid or offered to pay the full amount of the damage within 60 days from notice, the owner should have double damages, unless he recovered less than the amount offered by the company before suit. The plaintiff demanded and sued for $388.20. The company offered $500. The verdict was for $780. The Court said that the rudiments of fair play required by the Fourteenth Amendment were wanting when a defendant in such a case was compelled to guess rightly what a jury would find or pay double if that tribunal added a cent to the amount tendered, though the tender was futile because of an excessive demand.

In *Missouri, Kansas & Texas Ry. Co.* v. *Cade*, 233 U. S. 642, a statute regulating the presentation and collection of claims for personal service, material furnished, overcharges for freight, for lost or damaged freight, or for stock killed or injured, against any person or corporation,

less than $200 in amount, required that they be settled in 30 days and, if not, the person injured could bring suit, and, if he recovered the full amount of his claim, he should be entitled, in addition to the amount and costs, to a reasonable attorney's fee not exceeding $20. It was held that the attorney's fee here was manifestly only costs of suit and that, as the statute applied to every one and any person might be plaintiff or defendant, the mere distinction between the costs to be taxed against the plaintiff and those against the defendant did not deny the equal protection of the laws, because the plaintiff usually had the burden in the case, and, as the outlay for an attorney's fee was a necessary consequence of the litigation, it was reasonable to impose it upon the party whose refusal to pay the just claim rendered the litigation necessary.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg*, 238 U. S. 56, a statute requiring prompt furnishing of cars by carriers, and prompt loading by shippers, and which imposed the same penalty per car upon delinquents of either group, but which added attorney's fee to the penalty imposed on the carriers in case of recovery by a shipper, was held to deny to the carriers the equal protection of the laws, because in such a case there was no ground for putting the carriers in a different class from the shippers and imposing a special burden on them, when they were both in identically the same situation.

The general rule to be gathered from this extended review of the cases is, that common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries inflicted upon the property of members of the public in their performance; that the seasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and

pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees. But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and "violate the rudiments of fair play" insisted on in the Fourteenth Amendment, will be held to infringe it. In this scrutiny of the particular operation of a statute of this kind, we have sustained it in its application to one set of facts by the state court and held it invalid when applied to another. In some of the cases in which the statutes are sustained there is a fixed penalty or a limited attorney's fee. In others, the attorney's fee is merely required to be reasonable and fixed by the court. In some, there is a limit in the amount of the claims to which the statute applies, and in others, not. In some statutes held valid, the penalty or fee is allowed only on condition that the full amount claimed be recovered, in others, that the amount sued for be recovered. In the one case, the statute imposed no condition upon the imposition of a penalty that the full amount claimed or sued for should be recovered, but the Court refused to consider the validity of the penalty from that standpoint because the facts did not require it. In another case, the requirement that a tender of the amount recovered could alone save double damages was held invalid, because requiring a guess as to the verdict of the jury.

It is obvious that it is not practical to draw a line of distinction between these cases based on a difference of particular limitations in the statute and the different facts in particular cases. The Court has not intended to establish one, but only to follow the general rule that when, in their actual operation in the cases before it, such statutes work an arbitrary, unequal and oppressive result for

the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect of state legislation, they will not be sustained.

Coming now to the case before us, we find that the statute affects all common carriers, that it imposes on them the duty of considering and settling claims for loss of and damage to freight within 60 days, and provides that, if they do not so settle them and in a subsequent suit more is recovered than the amount tendered, the amount found due shall carry 7% interest from the presentation of the claim, as a penalty, and reasonable attorney's fees. If an appeal be taken and the plaintiff succeed, an additional attorney's fee may be included. The statute is confined to freight claims. It does not place a limit on them, but, as we have seen, the cases do not require this. The statute does require a tender, but in this case the claims were wholly rejected. No tender of any amount was even attempted. The claims numbered 105 when presented and sued on. They were reduced to 72. The trial lasted four days.

It is said here, as it was said in the *Polt Case* in 232 U. S. 165, that the company can not be subjected to a penalty for not guessing rightly the verdict of a jury. But the cases are very different. There the penalty was double damages for a failure to guess rightly as to the jury's view of damages from a fire to a house, when the extent of the damage was not peculiarly within the company's knowledge. Here the damages were for hogs, injured during the custody of the carrier, and whose value was determined by weight and market price and not difficult of ascertainment after a bona fide effort, and there was no effort at a tender at all. Here the penalty is only 7% interest on the actual recovery, and reasonable attorney's fees as costs. The amount of the attorney's fee, $200 for a case involving the preparation for trial of 72 different claims and a four days' trial, does not shock one's sense of fairness.

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* NYE SCHNEIDER FOWLER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 24. Argued April 18, 1922.—Decided November 13, 1922.

1. A state statute making the initial railroad carrier liable to the shipper for the default of its connecting carrier, is not lacking in due process of law if the first carrier is allowed subrogation against the second, whether the subrogation be founded on statute, common law, or equitable considerations. P. 37.
2. A statute imposing on common carriers the duty of seasonably considering and settling claims for loss or damage of freight, under pain of being required to pay 7% on the recovery and reasonable attorney's fees, to be fixed by the court, in any case where the claimant recovers judgment for more than has been tendered him by the carrier, is not *per se* objectionable under the equal protection or due process clauses of the Fourteenth Amendment. P. 38.
3. Such statutes are to be judged by their application in the particular case; where the result is fair and reasonable, they will be sustained; *aliter* where it is so arbitrary, unequal and oppressive as to shock the sense of fairness inspiring the Fourteenth Amendment. P. 43.
4. In this case, involving numerous claims for loss or injury to hogs while in the carrier's custody, the amount of which the carrier

It is further separately assigned for error that the Supreme Court imposed upon plaintiff in error an attorney's fee of $100 when it won the case on appeal by reducing the amount recovered in the trial court. The original § 6063, Revised Statutes of Nebraska, only provided for an attorney's fee to be fixed by the court; but c. 134, Laws of Nebraska, 1919, added the words "and in event an appeal be taken and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney fee to be fixed by such court or courts." This might have been construed to mean that the plaintiff could only have an attorney's fee in the appellate court or courts, if he maintained the judgment he had obtained in the court of first instance. But the Supreme Court of the State, and that controls our view, has evidently interpreted the words "the plaintiff shall succeed" to mean success in securing a judgment for more than the amount tendered, if any, and it is in light of this interpretation that we must consider the reasonableness of the statute and the validity of the fee fixed in this case.

The evident theory of the amendment of §6063, as thus interpreted, is that the burden of the litigation, both in the trial and appellate court, could be avoided by reasonable assiduity of the defendant carrier in availing itself of its peculiar sources of knowledge, ascertaining the actual damage and making a genuine tender of what it believes to be due, and, if the ultimate recovery is not more than the tender, that the claimant shall have neither interest nor attorney's fee. Under the circumstances, does the statute thus construed work a fair result? Here is an excessive claim of $2,000 reduced to $800 by a trial in one court, with an attorney's fee fixed at $600, and then an appeal by which the claim is reduced to $600, and the fee to $200. It is said that there were 105 claims reduced by the litigation to 72, and that claimant might have brought a separate suit on each and so had an attorney's

fee in each claim on which it recovered anything, making a larger aggregate of fees than it has secured. But we do not think this consideration can play any part in the case as it is. The claimant doubtless united the claims for its own convenience and to save its own time and that of its counsel.

Then it is said the fee in the Supreme Court is left to the discretion of that court, which can be trusted to do the fair thing as a chancellor often does, by dividing the costs on an equitable basis. But the difficulty with this view is that the construction which the Supreme Court has given the statute does not reserve to itself this power. It says that in such a statute the fee must be reasonable, in that it is to be based on a consideration of the value of the attorney's service to the claimant and the amount of time and labor expended by him, bearing a fair proportion to the amount of the judgment recovered. These are the usual and proper elements in fixing compensation for a lawyer's service. In other words, the Supreme Court, if any amount over the tender is recovered by its judgment, must fix a fee compensating the attorneys for the claimant for their work on the appeal, however excessive the recovery below and however much reduced on the appeal, if more than the original tender. Thus what we have here is a requirement that the carrier shall pay the attorneys of the claimant full compensation for their labors in resisting its successful effort on appeal to reduce an unjust and excessive claim against it. This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340. While the present case does not involve any such penalties as were there imposed, we think the principle applies to the facts of this case. We hold that so much of the statute as imposed an attorney's

fee upon the carrier in this case in the Supreme Court was invalid. The judgment of the Supreme Court is to this extent reversed and in other respects affirmed. The costs in this court will be taxed one-third to the defendant in error, and two-thirds to the plaintiff in error.

Reversed in part and Affirmed in part.